

September 2005

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### Recommended Citation

Epstein, Robert A. (2005) "Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and their Elusive Search for Employee Status on the Private University Campus," *Journal of Civil Rights and Economic Development*. Vol. 20 : Iss. 1 , Article 9.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol20/iss1/9>

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# BREAKING DOWN THE *IVORY TOWER SWEATSHOPS*<sup>1</sup>: GRADUATE STUDENT ASSISTANTS AND THEIR ELUSIVE SEARCH FOR EMPLOYEE STATUS ON THE PRIVATE UNIVERSITY CAMPUS

ROBERT A. EPSTEIN\*

## INTRODUCTION

“Clearly, anybody who starts grad school understands there are going to be sacrifices. At the same time, there are basic rights any employee has the right to expect. Health care. A decent wage. Some respect in the workplace.”<sup>2</sup> Spoken by a frustrated graduate student at Brown University, who was required during her first semester to teach a class of 102 students while earning a mere \$12,800 for the entire school year, this statement expresses the common frustrations shared by many graduate student workers.<sup>3</sup> Discussing the multiple roles filled by graduate

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<sup>1</sup> See Brown Univ., 342 N.L.R.B. No. 42, 2004–2005 NLRB Dec. (CCH) ¶ 16,694, at \*58 (2004) (Liebman, M., dissenting) (refuting majority's notion that academic world is immune from labor strife). See generally Matthew M. Bodah, *Labor Relation: Significant Labor and Employment Law Issues in Higher Education During the Past Decade and What to Look for Now: The Perspective of an Academician*, 29 J.L. & EDUC. 317, 317 (2000) (exploring developments in higher education labor law); Neal H. Hutchens & Melissa B. Hutchens, Article, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105, 106 (2004) (discussing employment status of graduate students).

<sup>2</sup> Justin Pope, *Teaching Assistants are Told: No Union*, THE ASSOCIATED PRESS, July 16, 2004 (quoting Brown University graduate student Sheyda Jahanbani).

<sup>3</sup> See John Gallagher, *Election Stakes High for Unions, Managers*, DETROIT FREE PRESS (Sept. 27, 2004), <http://www.freep.com/backindex/2004/09/27/homepage.htm> (discussing student's sentiment that important representational needs were denied); see

students in today's academic environment, the student added, "[w]e are teaching classes, grading papers, advising students, and performing work which is critical to the educational mission of this institution – and we're entitled to the same rights as any other group of workers."<sup>4</sup>

For better or for worse, university administrators are relying upon graduate students more than ever before<sup>5</sup> as a cost-effective way to operate institutions of higher learning.<sup>6</sup> Although one might ask why a student should be entitled to negotiate with a university over wages and working conditions when the primary goal is to learn and obtain a degree, the more important question is how the right to a better standard of living can be denied to a working individual simply because he or she is also a student.<sup>7</sup>

*also Graduate Student Employees United, Attorney General Certifies that a Majority of Columbia's Graduate Assistants Have Signed Union Membership Cards* (Dec. 21, 2004), <http://www.2110uaw.org/gseu/Spitzer%20certifies%20majority.htm> (quoting one student stating "[i]t is time for Columbia to recognize that we work and bargain with us over fair wages, equal pay for equal work, job descriptions, childcare for working parents, and healthcare benefits") [hereinafter *Attorney General*]. See generally Hutchens, *supra* note 1, at 107 (noting unionization efforts have sparked well-publicized debates at universities in recent years).

<sup>4</sup> International Union, UAW, *UAW Slams Labor Board Decision on Academic Employees* (July 16, 2004), <http://www.uaw.org/news/newsarticle.cfm?ArtId=281> (quoting Sheyda Jahanbani) [hereinafter *UAW*].

<sup>5</sup> See American Federation of Teachers, *Recognition and Respect: Standards of Good Practice in the Employment of Graduate Employees* (2004), [http://www.aft.org/pubs-reports/higher\\_ed/grad\\_employee\\_standards.pdf](http://www.aft.org/pubs-reports/higher_ed/grad_employee_standards.pdf), at 4 (citing U.S. Department of Education survey indicating graduate students constituted twenty percent of postsecondary instructional workforce in 2001) [hereinafter *Recognition and Respect*]; see also John C. Duncan, Jr., *The Indentured Servants of Academia: The Adjunct Faculty Dilemma and their Limited Legal Remedies*, 74 IND. L.J. 513, 524 n.67 (1999) (noting "[a]t research and comprehensive universities, the emphasis on research leads full-time faculty to withdraw from undergraduate teaching to the extent that they can. The remaining vacuum must be filled, and it is filled substantially with part-time or temporary faculty or graduate teaching assistants."); Hutchens, *supra* note 1, at 126 (stating, "[i]n an effort to contain costs, colleges and universities have increasingly relied on graduate students and non-tenure-track instructors").

<sup>6</sup> See *Recognition and Respect*, *supra* note 5, at 4 (quoting Clara Lovett, President, American Association for Higher Education, "I used to think graduate students were apprentices learning scholarship and not employees in the normal sense of the word. But over the last 20 years or so, we have turned graduate students into a very significant and very underpaid part of the academic workforce . . ."); see also Hutchens, *supra* note 1, at 126 (noting that reliance on graduate students has increased in effort to contain costs); Bernhard Wolfgang Rohrbacher, Notes and Comments, *After Boston Medical Center: Why Teaching Assistants Should Have the Right to Bargain Collectively*, 33 LOY. L.A. L. REV. 1849, 1849 (2000) (stating private universities increasingly rely on teaching assistants to perform services which would otherwise be provided by professors at considerably less cost).

<sup>7</sup> See New York Univ., 332 N.L.R.B. 1205, 1209 (2000) (finding most graduate student assistants are both students and statutorily defined employees), *overruled by* Brown Univ., 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694 (2004); see also *UAW*, *supra* note 4 (commenting on basic human right to bargain for better living standards).

The discussion of such fundamental rights to fair working standards falls under the guise of the National Labor Relations Act ("NLRA" or "The Act").<sup>8</sup>

Congress enacted the NLRA in 1935 to provide employees throughout the United States with the federally protected right to collectively bargain with employers, while avoiding situations of unequal bargaining power that obstruct the free flow of commerce.<sup>9</sup> Derived from Section 7 of the Act, this fundamental right provides employees with "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining."<sup>10</sup>

However, a working individual is only entitled to the Act's protection if he or she can be classified as an "employee" under Section 2(3).<sup>11</sup> Section 2(3) of the Act defines employee as including "any employee."<sup>12</sup> This broad, circuitous definition<sup>13</sup>

*See generally* Grant M. Hayden, "The University Works Because We Do": *Collective Bargaining Rights for Graduate Assistants*, 69 *FORDHAM L. REV.* 1233, 1237 (2001) (noting graduate assistants organize for standard reasons: lack of adequate compensation and lack of fringe benefits such as health care or contributions to state retirement fund).

<sup>8</sup> See 29 U.S.C. § 151, 157 (2004); *see also* Hayden, *supra* note 7, at 1234 (noting "[a]t private universities, the labor rights of graduate assistants are governed by the National Labor Relations Act"); Rohrbacher, *supra* note 6, at 1849 (explaining teaching assistants have been denied right to bargain collectively over employment terms and conditions because they are not considered employees under the NLRA).

<sup>9</sup> See 29 U.S.C. § 151 (2004) (indicating situations of unequal or oppressive bargaining power result in significantly negative impacts on flow of commerce, including depressed wage rates and purchasing power of wage earners in industry); *see also* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 *BERKELEY J. EMP. & LAB. L.* 295, 315 (2001) (stating importance of Act, which was part of Franklin Roosevelt's New Deal legislation, as most significant piece of legislation to affect classification of employment relationships up until that point in our nation's history). *See generally* Duncan, *supra* note 5, at 561 (noting Congress enacted National Labor Relations Act to allow employees to bind together as bargaining units to better their position through collective bargaining).

<sup>10</sup> See 29 U.S.C. § 157.

<sup>11</sup> See 29 U.S.C. § 157 (stating "Employees shall have the right") (emphasis added); *see also* Carlson, *supra* note 9, at 301 (noting that classification of individual workers as employees had little importance prior to legislature's desire to protect workers through collective bargaining, social security, minimum wage regulations, and anti-discrimination rules). *See generally* Hayden, *supra* note 7, at 1239 (stating "[e]xclusion from the Act's coverage means that employers retain the discretion to refuse to bargain or recognize an employee organization.").

<sup>12</sup> 29 U.S.C. § 152 (stating "[t]he term 'employee' shall include any employee . . ."). *See generally* Rohrbacher, *supra* note 6, at 1855 (noting definition of employee includes any employee, and expressed exceptions do not include government corporations and therefore only private, not public employees enjoy the protection of the NLRA."); Stephen L. Ukeiley, *Confusion at the National Labor Relations Board: the Misapplication of Board Precedent to Resolve the Yale University Grade-Strike*, 14 *HOFSTRA LAB. & EMP. L.J.* 527,

has been applied to a wide range of workers since the Act's inception,<sup>14</sup> and the Act itself contains few explicit exclusions from the employee definition. These exclusions include agricultural workers, supervisors, independent contractors, and individuals employed by a parent or spouse.<sup>15</sup>

As a result of this open definition, the National Labor Relations Board ("NLRB" or "The Board")<sup>16</sup> has been instilled with wide ranging flexibility and discretion in deciding who is entitled to protection.<sup>17</sup> As with governing bodies enforcing other federal employment statutes whose coverage depends upon similarly vague definitions of "employee," the NLRB has decided each case on its facts and circumstances.<sup>18</sup> Although non-

552 (1997) (explaining "[t]he term 'employee,' as it is defined in section 2(3), 'shall include any employee . . . unless [the Act] explicitly states otherwise.'").

<sup>13</sup> See *NLRB v. Town & Country Elec.*, 516 U.S. 85, 91-92 (1995) (supporting broad reading of Act's definition of employee); see also Carlson, *supra* note 9, at 297 (stating that law encourages ambiguity in employee status where two workers might perform same tasks but have different status); Rohrbacher, *supra* note 6, at 1855 (arguing that to whom rights and obligations of NLRA extend is less clear than one might initially think because NLRA offers only circular definitions of key terms employer and employee).

<sup>14</sup> See Carlson, *supra* note 9, at 302 (referring to Industrial Revolution, author states that number of occupations existing in our society has increased rapidly, thus making work relationships harder to define within traditional employment borders); see also Christina M. Lyons, 1993-94 *Annual Survey of Labor and Employment Law: Labor Law*, 36 B.C. L. REV. 307, 307-08 (1995) (discussing who has received NLRA coverage). See generally Jennifer A. Shorb, Note, *Working Without Rights: Recognizing Housestaff Unionization—An Argument for the Reversal of Cedars-Sinai Medical Center and St. Clare's Hospital*, 52 VAND. L. REV. 1051, 1067-70 (1999) (discussing history of NLRA).

<sup>15</sup> See 29 U.S.C. § 152(3) (stating "the term 'employee' . . . shall not include any individual employed as an agricultural laborer . . . or any individual employed by his parent or spouse, or . . . an independent contractor, . . . supervisor . . ."); see also *Boston Medical Ctr. & House Officers' Ass'n Comm. of Interns & Residents*, 330 N.L.R.B. 152, 159 (1999) (indicating that broad reading of employee definition of NLRA appropriately includes students because they are not listed among exclusions); Rohrbacher, *supra* note 6, at 1855 (discussing exclusions from definition of employee in NLRA).

<sup>16</sup> See 29 U.S.C. at § 156 (stating scope of authority of Board includes power to "make, amend and rescind" rules and regulations needed to implement the Act). See generally *Boston Medical Ctr.*, 330 N.L.R.B. at 159 (noting broad reading of employee definition of NLRA should include students); Rohrbacher, *supra* note 6, at 1855 (discussing exclusions from definition of employee in NLRA).

<sup>17</sup> See *Town & Country*, 516 U.S. at 91-92 (allowing broad reading of Act); see also *Nat'l Labor Relations Bd. v. Hearst Publ'ns*, 322 U.S. 111, 130 (1944) (providing deference to Board's expansive classification of newsboys as employees under Act because there existed economic interdependence between workers and employers). See generally *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 892 (1984) (holding that "undocumented aliens are not expressly exempted by Congress and therefore are within the expansive statutory definition of employee").

<sup>18</sup> See Fair Labor Standards Act, 29 U.S.C. § 203(e) (2004) (defining "employee" as "any individual employed by an employer"); see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2004) (defining "employee" as "an individual employed by an employer"); Carlson, *supra* note 9, at 298 (commenting that courts have had difficulty defining "employee" across various federal statutes). See generally *Nationwide Mut. Ins.*

protected workers can still organize and attempt to collectively bargain with employers, employers are under no obligation to recognize a group of non-protected workers. Thus, determinations of employee status are often critical to ensuring the existence of a proper collective bargaining process.

NLRB decisions of employee status have received particular attention in the area of graduate student assistants on private university campuses.<sup>19</sup> Graduate student assistants work for their respective universities while pursuing degrees of higher learning.<sup>20</sup> Specifically, students are predominantly separated into groups of teaching assistants, who typically teach lecture courses for a professor or preside over smaller discussion sections, and research assistants, who normally conduct field and laboratory research for professors.<sup>21</sup> Like most other workers, graduate student assistants are concerned with wages and benefits, work hours, and working conditions.<sup>22</sup> However,

Co. v. Darden, 503 U.S. 318, 342 (1992) (determining employee status in ERISA action by indicating, "[s]ince the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive'") (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)).

<sup>19</sup> See Hutchens, *supra* note 1, at 106 (recognizing increased questions regarding graduate students and employee status); see also Lori J. Cavell, *Graduate Student Unionization in Higher Education*, <http://www.ericdigests.org/2001-3/graduate.htm> (2000) (commenting on increasingly heated debate as to whether protected collective bargaining is appropriate for graduate students). See generally Joshua Rowland, "Forecasts of Doom": *The Dubious Threat of Graduate Teaching Assistant Collective Bargaining to Academic Freedom*, 42 B.C. L. REV. 941, 944 (2001) (highlighting that effects of NLRB decisions will likely be debated for next few years).

<sup>20</sup> See Hayden, *supra* note 7, at 1233 (noting that, in addition to earning graduate degrees, graduate students have greater teaching and research activities than previously seen); see also Hutchens, *supra* note 1, at 106 (explaining various responsibilities graduate students must juggle while focusing on their coursework); Rohrbacher, *supra* note 6, at 1849 (highlighting tutorial role of teaching assistants).

<sup>21</sup> See Hayden, *supra* note 7, at 1236 (indicating that such positions usually take up to twenty hours per week, but can vary dramatically). See generally Adelphi Univ., 195 N.L.R.B. 639, 640 (1972) (categorizing graduate students into teaching assistants and research assistants and differentiating their respective roles); Rohrbacher, *supra* note 6, at 1849 (explaining that teaching assistants may head small group discussions, provide individual tutoring and grade exams and papers).

<sup>22</sup> See New York Univ., 332 N.L.R.B. 1205, 120708 (2000) (concluding that graduate student assistant concerns in working context are no different from University's regular faculty in some aspects), *overruled by* Brown Univ., 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694 (2004); Hayden, *supra* note 7, at 1237 (discussing student concerns regarding adequate compensation). See generally Jeffrey Mervis, *Labor Seeks Fertile Ground On Ivy-Covered Campuses*; *Graduate Student Unions*, SCIENCE, November 15, 2002, at 1328 (noting that graduate student assistants are often dissatisfied with financial and non-financial aspects of their positions).

students have experienced great difficulty in effectuating change and as a result have turned to collective bargaining.<sup>23</sup>

Efforts by graduate students to gain protected recognition under the NLRA are complicated due to the employee status issue.<sup>24</sup> The primary issue is whether a student can simultaneously be an employee. Many who support student efforts to unionize under federal law believe students deserve the same claims to collective bargaining rights as other statutorily recognized university employees.<sup>25</sup> By contrast, opponents of such designation believe student collective bargaining is inappropriate because it can infringe upon the sacred educational notions of academic freedom and the student/teacher relationship.<sup>26</sup>

<sup>23</sup> See Hayden, *supra* note 7, at 1237 (commenting on how state legislators and university administrators tend to ignore student complaints); Steven Greenhouse, *Graduate Students Push For Union Membership*, THE NEW YORK TIMES, May 15, 2001, at A18 (positing that graduate students are forming bargaining groups as consequence of continual dismissals of their complaints by university officials). See generally Clayton Sinyai, *Academic Sweatshops: The Higher Unionizing; Pay Scale For Graduate-Student Teaching Assistants*, COMMONWEAL, May 18, 2001, at 10 (stating that common reason to protest student unionization is that "higher education is not a business" and therefore unionization is not "appropriate" when main objective is education, rather than increased profits).

<sup>24</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*2-3 (declaring that issue to be decided was whether or not graduate student assistants must be treated as employees for purposes of collective bargaining under NLRA); see also Hutchens, *supra* note 1, at 106 (reviewing long-standing exclusion of graduate students from NLRA's purview due to lack of employee status). See generally Gregory Gartland, *Of Ducks and Dissertations: A Call For a Return to the National Labor Relations Board's "Primary Purpose Test" in Determining the Status of Graduate Assistants Under the National Labor Relations Act*, 4 U. PA. J. LAB. & EMP. L. 623, 623-24 (2002) (highlighting that "lively debate" has developed as to whether graduate student assistants are "employees" under National Labor Relations Act).

<sup>25</sup> See *New York Univ.*, 332 N.L.R.B. at 1209 (holding that graduate assistants deserve employee status); see also Rowland, *supra* note 19, at 966 (discussing reasons why graduate student assistants are validly classified as employees under Board's sound reasoning in *New York University and Boston Medical Center*). See generally *Recognition and Respect*, *supra* note 5, at 5 (emphasizing that students would have to be replaced by full or part-time faculty members if they could not complete their work).

<sup>26</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*50 (explaining that collective bargaining in situation of graduate student assistants creates high risk of detriment to educational process); see also Rowland, *supra* note 19, at 947 (positing issue of teacher assistant unionization requires discussion of academic freedom violations). See generally Hillary Jewett, *Professionals In The Health Care Industry: A Reconsideration of NLRA Coverage of Housestaff*, 19 CARDOZO L. REV. 1125, 1141 (1997) (highlighting that "[t]he NLRB's concern that collective bargaining would undermine the 'personal' nature of the student-teacher relationship recalls the same paternalism that once granted industrial employers greater power over employees").

History demonstrates that this issue has played itself out somewhat differently in the public university arena.<sup>27</sup> As opposed to private universities, which are regulated by the NLRB, public universities are regulated by state legislatures.<sup>28</sup> Currently, fourteen states have laws permitting graduate students to unionize at public universities.<sup>29</sup> Only Ohio makes a specific exclusion for graduate student assistants in its labor statutes.<sup>30</sup> Within the realm of private universities, the NLRB has almost universally denied graduate student assistants employee status.<sup>31</sup>

<sup>27</sup> See Hutchens, *supra* note 1, at 108 (indicating that graduate student assistants at state universities are governed by state labor laws); see also Judith Wagner DeCew, *Unionization in the Academy: Visions and Realities*, 6 U. PA. J. LAB. & EMP. L. 221, 226 (2003) (highlighting that "the relationship between graduate students at public universities and their institution is governed by state law and decisions of state labor relations boards, not the NLRA or the NLRB"); See generally Glenn A. Duhl, *A Graduate Student Union at Tale*, THE CONNECTICUT LAW TRIBUNE, December 2, 1996, at 21 (commenting that some public universities, which are governed by state law rather than the NLRB, have been permitted to unionize); Yilu Zhao, *Columbia Graduate Students Strike To Support Union Efforts*, THE NEW YORK TIMES, Late Edition, April 30, 2002, at B2 (noting that "graduate students at public universities, covered by state labor laws have been allowed to unionize for years, but their counterparts at private universities have been permitted to unionize only recently").

<sup>28</sup> See Hutchens, *supra* note 1, at 108 (indicating state laws differ regarding unionization rights of employees); see also Ben Wildavsky, *Grad Students, The Sorest Apprentices*, U.S. NEWS AND WORLD REPORT, March 20, 2000, at 66 (explaining that public universities campuses are governed by state labor laws while private institutions fall under the jurisdiction of the National Labor Relations Board).

<sup>29</sup> See Hutchens, *supra* note 1, at 108 (citing Coalition of Graduate Employee Unions, *Frequently Asked Questions About Graduate Unions: Legal Issues*, <http://www.cgeu.org/FAQlegal.html> (last visited September 27, 2005) (discussing eligibility of graduate employees in California, Florida, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Rhode Island, Pennsylvania, and Wisconsin)). See generally Tim Cramm, *Prognosis Negative?: An Analysis of Housestaff Unionization Attitudes in the Wake of Boston Medical Center*, 87 IOWA L. REV. 1601, 1622 n.125 (2002) (noting that "graduate students at some public universities had been allowed to unionize under state law"); Hayden, *supra* note 7, at 1234-35 (recognizing that "[g]raduate assistants at public universities . . . remain subject to state labor laws, in which there is little consensus or convergence on their status for the purpose of collective bargaining").

<sup>30</sup> See Ohio Rev. Code Ann. 4117.01(C)(11) (Anderson Supp. 1999) (listing "[s]tudents whose primary purpose is educational training, including graduate assistants or associates" among exceptions to those who qualify as "public officials" for the purposes of collective bargaining); see also Hayden, *supra* note 7, at 1235 n.8 (noting that, in Ohio, "graduate assistants and part-time faculty are explicitly excluded" from collective bargaining); Hutchens, *supra* note 1, at 108 (explaining that Ohio "specifically excludes graduate employees from those public university employees eligible for coverage under collective bargaining agreements").

<sup>31</sup> See Brown Univ., 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*50 (2004); (denying employee status to students who were required to perform assistantships in order to obtain graduate degrees); The Leland Stanford Junior Univ. & The Stanford Union of Research Physicists, 214 N.L.R.B. 621, 623 (1974) (deciding against employee status for student research assistants); Adelphi Univ., 195 N.L.R.B. 639, 640 (1972) (holding that graduate students were not permitted to join faculty bargaining unit because they were not statutory employees).



Although this issue is not new,<sup>32</sup> three recent NLRB decisions have thrust it back into the spotlight.<sup>33</sup> In *Boston Medical Center Corporation and House Officers' Association/Committee of Interns and Residents* ("Boston Medical Center")<sup>34</sup> and *New York University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO* ("NYU"),<sup>35</sup> the Board overruled long-settled precedent denying NLRA protection to hospital house staff and graduate students by ruling such workers deserved employee status.<sup>36</sup> Most recently, however, the NLRB overruled NYU in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO* ("Brown University") by deciding that graduate students attending school for primarily educational reasons could not also be employees under the Act.<sup>37</sup> The Board did not apply its ruling to the hospital house staff at issue in *Boston Medical Center*.<sup>38</sup> As a result of the Board's decision, NYU ceased

<sup>32</sup> See Martin H. Malin, *Implementing the Illinois Educational Labor Relations Act*, 61 CHI.-KENT. L. REV. 101, 109 (1985) (discussing history of classification of graduate student assistants as employees under Florida and California laws); see also Stephen L. Ukeiley, *supra* note 12, at 535–37 (reviewing arguments made in 1996 case in which status of graduate students as employees was disputed).

<sup>33</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*50 (holding that graduate students cannot be considered employees); *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000) (declining to follow precedent in providing graduate students assistants with employee status), *overruled by Brown Univ.*, 342 N.L.R.B. No. 42; *Boston Medical Ctr.*, 330 N.L.R.B. 152, 152 (1999) (finding that hospital support staff workers should be considered employees).

<sup>34</sup> 330 N.L.R.B. 152, 152 (1999).

<sup>35</sup> 332 N.L.R.B. 1205, 1205 (2000), *overruled by Brown Univ.*, 342 N.L.R.B. No. 42.

<sup>36</sup> See *New York Univ.*, 332 N.L.R.B. at 1205 (following rationale of *Boston Medical Center*); *Boston Medical Ctr.*, 330 N.L.R.B. at 152 (finding that "interns, residents, and fellows . . . , while they may be students learning their chosen medical craft, are also "employees"); see also Rowland, *supra* note 19, at 962–63 (analyzing *New York University* & *Boston Medical Center* opinions).

<sup>37</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*51 (2004) (returning to "the Board's pre-NYU precedent that graduate student assistants are not statutory employees"); see also *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. No. 101, 2004-2005 NLRB Dec. (CCH) ¶ 16,762, at \*17 (2004) (following *Brown University* in stating that "graduate student assistants are not statutory employees").

<sup>38</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*4, n.4 (stating that it would express no decision in regards to earlier *Boston Medical* decision). See generally *Boston Medical Ctr.*, 330 N.L.R.B. 152, 152 (1999) (addressing issue of employment status of hospital house staff); Marc L. Leib, *White Coats and Union Labels: Physicians and Collective Bargaining*, 42 ARIZ. L. REV. 803, 819 (2000) (indicating need to overturn or drastically narrow holding of *Boston Medical Center*).

recognizing the graduate student union once the collective bargaining agreement expired.<sup>39</sup>

This note will focus on the ongoing struggle of graduate students to gain employee status under the NLRA. Part I will focus on unionization efforts on private university campuses involving both faculty members and students throughout the past three decades, with particular focus on the Board's recent decisions in *Boston Medical Center*, *NYU* and *Brown University*. Part II will suggest that *Brown University* was wrongly decided and will include an analysis of the working relationship between private universities and graduate students in the modern academic environment. This Part will also consider potential infringements upon academic freedom and student/teacher relationships, as well as an analysis of the comparison between graduate student assistants and disabled individuals working at a rehabilitation clinic.

## I. COLLECTIVE BARGAINING RIGHTS OF FACULTY MEMBERS AND GRADUATE STUDENTS ON PRIVATE UNIVERSITY CAMPUSES

The issue of unionization on private university campuses has been debated for many years due to concerns over the potentially negative impacts of unionization on academic freedom.<sup>40</sup> The Supreme Court, in quoting the NLRB, once stated that "[t]he concept of collegiality 'does not square with the traditional authority structures with which [the] Act was designed to cope in the typical organizations of the commercial world'"<sup>41</sup> and that

<sup>39</sup> See Eric Lekus, *NYU Will No Longer Recognize UAW as Representative of Graduate Assistants*, BNA DAILY LAB. REP., Aug. 9, 2005 (stating that current agreement expired August 31st, 2005, but that NYU will continue to maintain certain financial commitments to students); see also *NYU Offers Sham Contract, Then Refuses to Negotiate*, [http://www.2110uaw.org/gsoc/GSOC\\_update\\_August\\_9\\_05.htm](http://www.2110uaw.org/gsoc/GSOC_update_August_9_05.htm), (last visited September 27, 2005) (discussing NYU's refusal to negotiate).

<sup>40</sup> See *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977) (defining academic freedom as "not only the right to speak freely in the classrooms, but also as including such fundamental rights as the right to determine course length and content; to establish standards for advancement and graduation; to administer examinations; and to resolve a multitude of other administrative and educational concerns"), *overruled by Boston Medical Center*, 330 N.L.R.B. at 152; see also Rowland, *supra* note 19, at 947-53 (reviewing history of academic freedom and its role in establishment of unions for professors); Eva M. Panchyshyn, Comment, *Medical Resident Unionization: Collective Bargaining by Non-Employees for Better Patient Care*, 9 ALB. L.J. SCI. & TECH. 111, 121 (1998) (summarizing Board's concerns over academic freedom).

<sup>41</sup> *Nat'l Labor Relations Bd. v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) (quoting *Adelphi Univ.*, 195 N.L.R.B. 639, 648 (1972)).

"[p]rinciples developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"<sup>42</sup> Reviewing the progression of unionization on private university campuses from faculty unions to graduate student unions provides an understanding of the difficulty involved in balancing the integrity of the academic environment with the necessary employee protections afforded by the NLRA.

### A. Faculty Unions

#### i. Full-Time

The Board first imposed jurisdiction over a private university in 1970.<sup>43</sup> Soon after, it approved the formation of a full-time faculty bargaining unit<sup>44</sup> by determining that faculty members constituted "professional employees" within the meaning of Section 2(12) of the NLRA.<sup>45</sup>

<sup>42</sup> *Yeshiva Univ.*, 444 U.S. at 681 (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)).

<sup>43</sup> See *Cornell Univ.*, 183 N.L.R.B. 329, 331 (1970) (exercising jurisdiction over private institution); see also *Rowland*, *supra* note 19, at 952–53 (submitting "since the NLRB first exercised jurisdiction over private universities in 1970, the Board has struggled to define clear and consistent standard regarding employee status of students"); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals under the NLRA*, 89 COLUM. L. REV. 1775, 1805 (1989) (confirming "[t]he NLRB asserted jurisdiction over private colleges and universities in 1970").

<sup>44</sup> See *C. W. Post Ctr. of Long Island Univ.*, 189 N.L.R.B. 904, 905 (1971) (holding full-time university faculty members perform tasks and duties as collective group deserving of NLRA protection). But see *Univ. of Great Falls v. N.L.R.B.*, 278 F.3d 1335, 1347 (D.C. Cir. 2002) (holding NLRB had no jurisdiction over religiously affiliated and nonprofit educational institution). See generally *Duncan*, *supra* note 5, at 561–62 (discussing history of full-time faculty and adjunct bargaining).

<sup>45</sup> 29 U.S.C. § 151, 152 (12) (2004).

The term professional employee means –

any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical process; or any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

In 1980, the Supreme Court in *National Labor Relations Board v. Yeshiva University*<sup>46</sup> first held that full-time faculty members were professional employees within the meaning of the Act, but that they could not garner the Act's protection if they were also "managerial employees."<sup>47</sup> The Court explained that faculty members who engaged in practices aligned with those of university administration, such as making recommendations on university curriculum, faculty hiring, admission standards, and class size, were more likely to be considered managerial employees.<sup>48</sup>

There are far fewer faculty unions in the private sector than in the public sector in part because of *Yeshiva University*.<sup>49</sup> Case law indicates that, from 1980-1998, there were ten instances where faculty members received the Act's protection,<sup>50</sup> and

*Id.*

<sup>46</sup> 444 U.S. 672 (1980).

<sup>47</sup> See *Yeshiva*, 444 U.S. at 682 (stating "[m]anagerial employees are defined as those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer'" (quoting Nat'l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 288 (1974))).

<sup>48</sup> See *Yeshiva*, 444 U.S. at 682 (discussing different functions of faculty members that might lead them to be properly classified as managerial); see also Charles J. Morris, *A Blueprint for Reform of the National Labor Relations Board*, 8 ADMIN. L.J. AM. U. 517, 559 (1994) (noting holding in *Yeshiva* could be applied to other jobs where individuals exercise managerial authority); Donna R. Euben, *Annual Legal Update: "Hot" Topics in Higher Education Law*, [www.aaup.org/Legal/info%20outlines/04cbissues.htm](http://www.aaup.org/Legal/info%20outlines/04cbissues.htm) (April 19, 2004) [hereinafter *Legal Update*] (citing California School of Professional Psychology and California Federation of Teachers to show that primary considerations to determine whether faculty members are managerial in post-*Yeshiva* environment requires examination of whether university effectively considered faculty recommendations on academic policy and governance of institution).

<sup>49</sup> See Donna R. Euben, *Collective Bargaining: Revised and Revisited 2001*, at [www.aaup.org/Legal/info%20outlines/legcb.htm](http://www.aaup.org/Legal/info%20outlines/legcb.htm) (2001) [hereinafter *Collective Bargaining*] (discussing 1997 study of collective bargaining in higher education over ninety-six percent of union-represented faculty members were in public sector, consisting of approximately 240,000 unionized faculty on over 1,000 public campuses and approximately 11,000 unionized faculty at about seventy private institutions) Courtney Leatherman, *Union Movement at Private Colleges Awakens After a 20-Year Slumber*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 21, 2000, at A16 (discussing number of cases regarding faculty member attempts to be included within Act's coverage); Rabban, *supra* note 43, at 1824 (noting that universities used *Yeshiva* to prevent faculty members from unionizing).

<sup>50</sup> See David Wolcott Kendall Mem'l Sch. v. NLRB, 866 F.2d 157 (6th Cir. 1989); NLRB v. Cooper Union for Advancement of Science & Art, 783 F.2d 29 (2d Cir. 1986); Loretto Heights Coll. v. NLRB, 742 F.2d 1245 (10th Cir. 1984); Spencer v. St. John's Univ., 1989 U.S. Dist. LEXIS 3421 (E.D.N.Y. 1989); Marymount Coll. of Virginia, 280 N.L.R.B. 486 (1986); Trustee of St. Joseph's Coll., 282 N.L.R.B. 65 (1986); Bradford Coll., 261 N.L.R.B. 565 (1982); Stephens Coll., 260 N.L.R.B. 1049 (1982); Univ. of San Francisco, 265 N.L.R.B. 1221 (1982); New York Med. Coll., 263 N.L.R.B. 903 (1982).

twelve instances where coverage was denied because faculty members were deemed managerial.<sup>51</sup>

## ii. Part-Time/Adjunct

Part-time faculty members currently constitute approximately one-third of all faculty members at both public and private institutions.<sup>52</sup> They typically receive low pay for their services and are unable to significantly affect university policy decisions.<sup>53</sup> As a result, administrators, full-time faculty members, and students often look down upon these faculty members as teachers who both operate on a lower tier from full-time faculty members and essentially fill a given need at a given time.<sup>54</sup>

Part-time faculty members' concern with their lack of rewards and job security, which falls within the "wages, hours of employment, or other conditions of employment" language of the Act,<sup>55</sup> makes them strong candidates for federally protected

<sup>51</sup> See *Boston Univ. Chapter, Am. Ass'n of Univ. Professors v. NLRB*, 835 F.2d 399 (1st Cir. 1987); *NLRB v. Lewis Univ.*, 765 F.2d 616 (7th Cir. 1985); *Elmira Coll.*, 309 N.L.R.B. 842 (1992); *Lewis & Clark Coll.*, 300 N.L.R.B. 155 (1990); *Univ. of Dubuque*, 289 N.L.R.B. 349 (1988); *Livingstone Coll.*, 286 N.L.R.B. 1308 (1987); *Am. Int'l Coll.*, 282 N.L.R.B. 189 (1986); *Univ. of New Haven*, 267 N.L.R.B. 939 (1986); *Coll. of Osteopathic Med. & Surgery*, 265 N.L.R.B. 295 (1982); *Duquesne Univ. of Holy Ghost*, 261 N.L.R.B. 587 (1982); *Ithaca Coll.*, 261 N.L.R.B. 577 (1982); *Thiel Coll.*, 261 N.L.R.B. 580 (1982).

<sup>52</sup> See Duncan, *supra* note 5, at 516 (stating total number constitutes wide variety of similarly situated part-time faculty members, including adjuncts, acting faculty, and temporary employees). See generally *Treat Part-Time Faculty More Fairly if You Want to Improve Program Quality*, HR ON CAMPUS, April 19, 2001, at 1 (stating "[p]art-time faculty members don't have benefits, security, good wages or respect"); Patrick Kavanagh, *A Vision of Democratic Governance in Higher Education: The Stakes of Work in Academia*, SOC. POL'Y, June 22, 2000, at 24 (stating that part-time faculty are rarely given same benefits as full time staff).

<sup>53</sup> See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 137 (1997) (discussing fact that adjunct-law school professors are generally low paid); Duncan, *supra* note 5, at 521-24 (indicating that low wages provide safety for cost-conscious university, while inability to voice concerns in governing of university creates "ambiguous" role for part-timers); Risa L. Lieberwitz, *The Marketing of Higher Education: The Price of Higher Education: Universities in the Marketplace: The Commercialization of Higher Education*, 89 CORNELL L. REV. 763, 765 (2004) (noting that adjunct and part-time faculty are usually low paid and receive no benefits).

<sup>54</sup> See Duncan, *supra* note 5, at 586 n. 71 (describing sentiment of many part-time faculty members resulting from low pay, insignificant rewards, and little job security); see also *Treat Part-Time Faculty More Fairly if You Want to Improve Program Quality*, HR ON CAMPUS, April 19, 2001, at 1 (stating "[p]art-time faculty members don't have benefits, security, good wages or respect"); Kavanagh, *supra* note 52, at 24 (stating that part-time faculty are rarely given same benefits as full time staff).

<sup>55</sup> 29 U.S.C. § 159(a) (noting that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of

collective bargaining.<sup>56</sup> In 1971, the NLRB held that part-timers were professional employees within the meaning of the Act,<sup>57</sup> but later determined that part-time faculty members could not be placed within the same bargaining unit as full-time faculty members because they had a differing "mutuality of interests."<sup>58</sup> However, a determination of interests can vary with each institution.<sup>59</sup> As one former NLRB board member put it, "The greater the role given part-timers in the daily functioning of the institution, and the greater their participation in the university-provided fringe benefits, the more likely it is that they will be found to share a community of interest with their full-time

collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .").

<sup>56</sup> See Duncan, *supra* note 5, at 524 (stating that part-time professors become more easily disillusioned with their jobs because there are no guarantees that they will be permitted to teach beyond existing term). See generally *Treat Part-Time Faculty More Fairly if You Want to Improve Program Quality*, HR ON CAMPUS, April 19, 2001, at 1 ("Part-time faculty members don't have benefits, security, good wages or respect."); Kavanagh, *supra* note 52, at 24 (stating part-time faculty are rarely given same benefits as full time staff).

<sup>57</sup> See C.W. Post Ctr. of Long Island Univ., 189 N.L.R.B. 904, 908 (1971) (finding adjunct faculty appropriate for bargaining unit because of similarities in low pay and lack of fringe benefits); Univ. of San Francisco 265 N.L.R.B. 1221, 1224 (1982) (holding part time faculty were an appropriate group for collective bargaining purposes); see also Duncan, *supra* note 5, at 563 (discussing how "regular" part-time employees, part-time members with one-quarter or more of work performed by full-time members, were included with full-time members if they worked significant number of regular hours per week, performed tasks similar to full-time employee, and shared same supervision, working conditions, wages, and fringe benefits).

<sup>58</sup> See New York Univ., 205 N.L.R.B. 4, 13-14 (1973) (finding part-time faculty and full-time faculty lacked mutuality of interest in compensation, participation in university governance, eligibility for tenure, and working conditions); see also Trustees of Boston Univ. v. NLRB, 575 F.2d 301, 308 (1978) (following *New York University* in excluding part-time faculty from bargaining unit); Duncan, *supra* note 5, at 562 (listing factors considered by courts and Board in determining whether proposed unit shares community of interest amongst its employees, including (1) similarity in skills, training, or expertise; (2) similarity in job functions or job classifications; (3) similarity in wages, wage scale, or method of determining compensation; (4) similarity in fringe benefits; (5) similarity in work hours; (6) similarity in work clothes or uniforms; (7) similarity of job status or geographical proximity of employees; (8) interchangeability of employees or job assignments; (9) common supervision; (10) centralization of employer's personnel and labor policies; (11) integration of employer's production processes or operation; (12) similarity of relationship to employer's administrative or organizational structures; (13) common history of bargaining with employer; (14) reflection of industry bargaining pattern; (15) expressed desires of employees; and (16) employee's organizational framework or extent of union organization).

<sup>59</sup> See Duncan, *supra* note 5, at 565 (revealing that this seemingly well-settled area is subject to change depending on individualized case facts); see also Sally J. Whiteside, Robert P. Vogt & Sherryl R. Scott, *Illinois Public Relations Laws: A Commentary and Analysis*, 60 CHI.-KENT. L. REV. 883, 888 (1984) (highlighting views of both proponents and opponents regarding inclusion of part-time faculty in bargaining unit). See generally Hayden, *supra* note 7, at 1244 (noting part-time faculty have been making "tremendous strides" in securing right to bargain collectively).

colleagues sufficient to justify their inclusion in a single bargaining unit.”<sup>60</sup>

Part-time faculty members were first entitled to form their own NLRB-recognized bargaining units in 1982.<sup>61</sup> Although the university argued that part-timers were essentially temporary employees by nature, the Board felt that similarities between the full-timers and part-timers in regards to compensation, hours, and roles within the same administrative structure entitled them to form their own protected unit.<sup>62</sup>

### *B. Graduate Student Unions*

#### i. Development of the Primary Purpose Analysis

In the private university context, the Board first addressed the issue of graduate student unionization in *Adelphi University and Adelphi University Chapter, American Association of University Professors* (“*Adelphi University*”).<sup>63</sup> Whether graduate teaching and research assistants should be included in a unit with full-time and regular part-time faculty was just one disputed issue addressed by the Board.<sup>64</sup> It was here that the Board first applied a “primary purpose” approach towards graduate students, stating that the students were “[p]rimarily students and therefore [did] not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit.”<sup>65</sup> The Board focused on the graduate students’ lack of faculty rank

<sup>60</sup> See Duncan, *supra* note 5, at 565 (quoting Peter D. Walther, a former Board member, in *The N.L.R.B. in Higher Education*, a paper presentation to ACBIS-CUPA Collective Bargaining Conference, Washington D.C. on Dec. 11, 1977).

<sup>61</sup> See *Univ. of San Francisco*, 265 N.L.R.B. 1221, 1221 (1982) (allowing 250 part-time lecturers and 120 adjunct faculty in over 100 California locations to form their own bargaining unit); see also Hayden, *supra* note 7, at 1244 (discussing bargaining units created by and for part-time faculty). See generally Duncan, *supra* note 5, at 560 (specifying that in 1982, part-time faculty in three different institutions formed separate bargaining units).

<sup>62</sup> See *Univ. of San Francisco*, 265 N.L.R.B. at 1222 (stating that, even though part-timers were hired on as-needed basis and were not entitled to tenure, such facts were not germane to denying their ability to form bargaining unit); see also *Parsons School of Design*, 268 N.L.R.B. 1011, 1011 (1984) (reciting and following *Univ. of San Francisco* holding). See generally Duncan, *supra* note 5, at 569 (noting how *Univ. of San Francisco* holding set precedent for allowing part-timers to form their own bargaining units).

<sup>63</sup> 195 N.L.R.B. 639 (1972).

<sup>64</sup> See *id.* at 639 (addressing various disputed issues other than graduate students including alleged supervisors and university personnel and grievance committees).

<sup>65</sup> *Id.* at 640.

and vote at faculty meetings, their ineligibility for tenure, promotion, or coverage by the University personnel plan, and the dependency of their employment on student-status.<sup>66</sup>

In subsequent cases, the Board elaborated on the primary purpose approach and its application.<sup>67</sup> First, it reinforced the approach by concluding that student compensation was unrelated to work performed, because the same compensation was paid whether the student was a teaching assistant, a research assistant, or had received a non-working fellowship.<sup>68</sup> This compensation system demonstrated to the Board that payments to students were intended for tuition use, and were not based on either student skill level or work complexity.<sup>69</sup>

Next, the Board expanded the primary purpose approach by applying it to hospital house staff, including medical interns and residents.<sup>70</sup> The Board determined that members of a house staff were not employees under the Act because they were essentially training for future medical careers, despite the fact that they had already obtained medical degrees.<sup>71</sup> The Board further

<sup>66</sup> See *id.* at 640.

<sup>67</sup> See *The Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974) (applying primary purpose approach to various research assistants); see also *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977) (extending primary purpose approach to medical student interns and residents at hospitals), *overruled by Boston Medical Center*, 330 N.L.R.B. 152, 152 (1999); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976) (using primary purpose approach to deny medical student hospital house staff employee status under National Labor Relations Act), *overruled by Boston Medical Center*, 330 N.L.R.B. at 152.

<sup>68</sup> See *Leland*, 214 N.L.R.B. at 623 (expanding on Board's *Adelphi* analysis to deny employee status to graduate assistants); see also *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*1 (2004) (explaining *Adelphi*'s exclusion of graduate students from bargaining units based, in part, on fact that students' stipends were not dependent on nature or intrinsic value of services performed). See generally Ukeiley, *supra* note 12, at 546 (summarizing *Leland* finding that neither quality of students' research nor amount of time spent on research was reflected in their stipends).

<sup>69</sup> See *Leland*, 214 N.L.R.B. at 623 (categorizing research assistants' stipends as type of financial aid); see also *Brown*, 342 N.L.R.B. No. 42, at \*1 (noting purpose of stipends in *Leland* was to provide students with financial support). See generally Ukeiley, *supra* note 12, at 546 (explaining Board's position in *Leland* that stipends were provided for "individual advancement" of graduate students as opposed to benefit of University).

<sup>70</sup> See *St. Clare's Hosp.*, 229 N.L.R.B. at 1000 (excluding medical student interns and residents from bargaining units under the National Labor Relations Act); see also *Cedars-Sinai*, 223 N.L.R.B. at 253 (finding interns, residents, and clinical fellows in hospitals are primarily students). See generally Hutchens, *supra* note 1, at 113-14 (summarizing Cedars-Sinai decision defining house staff primarily as students and not employees under NLRA).

<sup>71</sup> See *Cedars-Sinai*, 223 N.L.R.B. at 253 (holding that employee status is not deserved because house staff worked for their own educational and licensing purposes and were only with hospital for temporary period of time, even though eighty percent of work performed was in direct patient care); see also *St. Clare's Hospital*, 229 N.L.R.B. at 1002



expounded that defining the staff as employees would infringe upon sacred notions of academic freedom involved with such work.<sup>72</sup> It defined academic freedom as "not only the right to speak freely in the classrooms, but also such fundamental matters as the right to determine course length and content; to establish standards for advancement and graduation; to administer examinations; and to resolve a multitude of other administrative and educational concerns."<sup>73</sup>

## ii. Institution of the Compensated Services Method

In 1999, the law was well settled that graduate student assistants and hospital house staff were not employees within the meaning of the NLRA.<sup>74</sup> However, in *Boston Medical Center*<sup>75</sup> the Board overruled previous precedent by classifying hospital house staff as employees under a "compensated services" approach.<sup>76</sup>

Through a literal reading of Section 2(3), the Board held that hospital house staff was not listed among the Act's few exclusions.<sup>77</sup> As seen with other employee status determinations made by regulatory bodies, where the employment statute had a

(following *Cedars-Sinai* rationale in denying medical student interns and residents representation in collective bargaining unit because their services constituted an integral part of their educational program and were, thus, considered predominantly academic, not economic). But see *Cedars-Sinai*, 223 N.L.R.B. at 254-55 (Fanning, J., dissenting) (stating real question is whether house staff can be both students and employees simultaneously, and that there is no specific exclusion for students within NLRA, thus inviting employee classification).

<sup>72</sup> See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 252-53 (1976) (describing academic schedule and necessary environment for interns); *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977) (commenting on structure of work performed by house staff members, including long work hours required to gain broad base of experience with emergency situations and recommendation period, where poor recommendation by senior physician could be claimed as unfair discharge if collective bargaining agreement was in place); *Leland Stanford Junior University*, 214 N.L.R.B. at 622-23 (noting individual-oriented nature of resident work is essential to learning process).

<sup>73</sup> *St. Clare's Hosp.*, 229 N.L.R.B. at 1002.

<sup>74</sup> See *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972) (categorizing research assistants as "primarily students"); *Cedars-Sinai*, 223 N.L.R.B. at 251 (holding that Act's definition of employee status does not include hospital interns, residents, and clinical fellows); *St. Clare's Hosp.*, 229 N.L.R.B. at 1002 (concluding that workers were not employees for purposes of Act).

<sup>75</sup> 330 N.L.R.B. 152 (1999).

<sup>76</sup> *Boston Medical Ctr.*, 330 N.L.R.B. at 152.

<sup>77</sup> See *id.* at 159 (determining if there were no compelling statutory or policy reasons to exempt graduate students from Act's protection, students should fall within boundaries of Act's expansive employee definition); see also Leib, *supra* note 38, at 818-19 (discussing NLRB's decision in *Boston Medical Center* granting "employee" status to all house staff members).

similarly vague definition of "employee," the Board broadly interpreted the employee definition from a common law master/servant relationship perspective. As a result, it concluded the house staff members were employees because they performed services for another and were subject to the other's control or right of control.<sup>78</sup> The Board rejected prior reasoning in finding that paid compensation and benefits<sup>79</sup> for such services was "strongly indicative of employee status,"<sup>80</sup> even though the house staff obtained significant educational benefit in performing eighty percent of their work in direct patient care.<sup>81</sup>

The NLRB also rejected the notion that academic freedom on campus would be violated, reasoning that any threats of such a violation could be easily avoided through respectful collective bargaining between the two parties in adherence to the "educational mission of the institutions they serve."<sup>82</sup>

Subsequently, the Board applied its *Boston Medical Center* rationale in *NYU*, finding that graduate student assistants, including teaching and research assistants, were employees within the meaning of the Act.<sup>83</sup> The university attempted to

<sup>78</sup> See *Boston Medical Center*, 330 N.L.R.B. at 159–60 (reasoning duties of house staff are essentially the same as duties of employees); see also *New York Univ.*, 332 N.L.R.B. at 1206 (holding house staff met criteria of designated employees); Jeffrey Rugg, *An Old Solution to a New Problem: Physician Unions Take the Edge Off Managed Care*, 34 COLUM. J.L. & SOC. PROBS. 1, 32 (2000) (commenting on Board's broad interpretation of "employee" without considering different collective bargaining interests among different employee groups).

<sup>79</sup> See *Boston Medical Center*, 330 N.L.R.B. at 159–60 (pointing out that staff members received numerous fringe benefits including paid vacations and sick leave, as well as health, dental, and life insurance); see also Hayden, *supra* note 7, at 1246 (noting *Boston Medical Center* opinion focused on indicia of employment such as compensation and benefits); Hutchens, *supra* note 1, at 113–14 (discussing importance placed on interns receiving compensation in rationale of *Boston Medical Center*).

<sup>80</sup> *Boston Medical Center*, 330 N.L.R.B. at 159–60 (rationalizing although hospital classified compensation provided as "stipend," Internal Revenue Code does make exclusion for such stipends, resulting in income taxes and social security being removed from compensation).

<sup>81</sup> See *Boston Medical Ctr.*, 330 N.L.R.B. 152, 164 (1999) (acknowledging educational benefits received by house staff in performance of their duties); *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000) (noting educational benefits do not preclude employee status); Hutchens, *supra* note 1, at 115–16 (commenting on Board's rejection of argument that student's duties are primarily educational).

<sup>82</sup> *Boston Medical Ctr.*, 330 N.L.R.B. at 164 (deciding not to define limits on what can and cannot be bargained for between two officially recognized parties under Act).

<sup>83</sup> See *New York Univ.*, 332 N.L.R.B. at 1205 (detailing that majority of graduate student workers were doctoral students and approximately 1,700 of 17,500 total graduate students became involved with assistantships, graders, and tutors); see also Hutchens, *supra* note 1, at 113–15 (discussing similar holdings of *NYU* and *Boston Medical Center*); Rowland, *supra* note 19, at 943 (commenting on *NYU's* application of *Boston Medical Center* rationale).

distinguish *NYU* from *Boston Medical Center* by asserting the following differences: NYU graduate students worked in furtherance of their degrees, while the house staff had already obtained their degrees; most NYU students were not required to work and any such work involved a minimal time commitment; and NYU students received financial aid, rather than compensation for work performed.<sup>84</sup> By broadly interpreting the NLRA's definition of employee from the right of control perspective, as it did in *Boston Medical Center*, the Board rejected the university's arguments and found that existing distinguishing features could not disguise the fact that the NYU students performed work under the control of the university and were compensated as a result.<sup>85</sup>

Additionally, the Board also rejected the university's policy arguments,<sup>86</sup> which are key to suggesting that graduate students should be protected by the Act. Each policy argument will be discussed in greater detail in Part II of this note. First, the Board disagreed with the university's comparison of graduate students at universities to disabled individuals in rehabilitative programs, even though both situations appeared to reside outside of the industrial/economic-type relationships protected by the Act.<sup>87</sup> The Board rejected use of the primary purpose analysis for

<sup>84</sup> See *New York Univ.*, 332 N.L.R.B. at 1206–07 (articulating arguments made by university); see also Rowland, *supra* note 19, at 960 (reiterating arguments made by university regarding details of relationship between graduate student teaching assistants and NYU); Hutchens, *supra* note 1, at 115 (acknowledging university's arguments that graduate student teaching assistants were not employees since their primary role was "student" and they only received financial aid for their services).

<sup>85</sup> See *New York Univ.*, 332 N.L.R.B. at 1206–09 (recognizing graduate student teaching assistants performed their work under terms and direction of each department they were involved with, did not receive academic credit for their work, were paid with income taxable funds through university's payroll system, and received less educational benefits than hospital house staff, thus making them even more deserving of employee classification); see also Hayden, *supra* note 7, at 1250 (stating that "graduate assistants' relationship with the employer is indistinguishable from traditional master-servant relationship"); Rowland, *supra* note 19, at 960 (explaining Board's finding that both hospital house staff and graduate student teaching assistants are protected by National Labor Relations Act).

<sup>86</sup> See *New York Univ.*, 332 N.L.R.B. at 1207 (announcing Board's rejection of university's argument analogizing graduate student teaching assistants with disabled individuals for purposes of protection under National Labor Relations Act); see also Rowland, *supra* note 19, at 960 (noting Board's rejection of policy arguments); *Graduate Assistants are Employees Entitled to Unionize*, CALIFORNIA EMPLOYMENT LAW LETTER, Nov. 27, 2000 [hereinafter *Graduate Assistants*] (identifying Board's refusal to adopt arguments asserted by NYU).

<sup>87</sup> See *New York Univ.*, 332 N.L.R.B. at 1207 (disagreeing with university's comparison of graduate student teaching assistants in academic environment with

students and distinguished them from disabled individuals by noting that disabled individuals in the rehabilitative program discussed required special assistance, received counseling rather than discipline, and were permitted to work at their own pace.<sup>88</sup> The Board considered such characteristics drastically different from those of graduate students, who it felt had working conditions similar in some respects to those of university faculty. Thus, it determined that disabled individuals were much further removed than students from the typical working relationships covered by the Act.<sup>89</sup> Second, the Board applied its *Boston Medical Center* rationale in rejecting similar arguments regarding infringements upon academic freedom and student/teacher relationships. It added that the Act does not require an agreement between parties, but rather just the process of collective bargaining in an attempt to reach an agreement.<sup>90</sup>

The Board's overall decision classified most of the graduate student assistants as employees within the meaning of the Act,

disabled individuals in rehabilitative environment as seen in *Goodwill Industries of Tidewater, Inc.*, 304 N.L.R.B. 767, 768 (1991)); *see also* Rowland, *supra* note 19, at 960 (asserting that Board found university did not articulate "the proper controlling precedent"). *See generally* *Goodwill Indus. of Tidewater, Inc.*, 304 N.L.R.B. at 767-68 (specifying what Board looked at when determining whether disabled individuals employed as janitors were employees under Section 2(3) of National Labor Relations Act).

<sup>88</sup> *See* *New York Univ.*, 332 N.L.R.B. 1205, 1207 (2000) (contrasting situation of disabled individuals with graduate student teaching assistants, who have many similar concerns to statutorily recognized faculty members); *see also* Rowland, *supra* note 19, at 960 (explaining Board's conclusion that disabled individuals were different from graduate student teaching assistants because of rehabilitative nature of their employment and their atypical working situations); *Recent Case: Labor Law - NLRB Holds That Graduate Assistants Enrolled at Private Universities are "Employees" under the National Labor Relations Act* - *New York University*, 332 N.L.R.B. No. 111, 114 HARV. L. REV. 2557, 2559 (2001) [hereinafter *Recent Case*] (declaring "the Board in New York University depended on Boston Medical Center's abrogation of the 'primary students' test").

<sup>89</sup> *See* *New York Univ.*, 332 N.L.R.B. at 1208 (finding similarities between working conditions of graduate student teaching assistants and regular university faculty); *see also* Rowland, *supra* note 19, at 960 (maintaining Board found working situation of graduate student teaching assistants very similar to working conditions of standard university faculty members); *Graduate Assistants*, *supra* note 86 (articulating Board's finding that "the working relationship between the graduate assistants and NYU was analogous to the traditional economic relationship between the faculty and the university").

<sup>90</sup> *See* *New York Univ.*, 332 N.L.R.B. at 1208 (stating Act only requires bargaining, not an agreement, and thus should not be assumed that permitting graduate student teaching assistants to bargain, similarly to faculty, would interfere with academic freedom possessed by university); *see also* Rowland, *supra* note 19, at 961 (restating Board's finding that academic freedom would not be disrupted); *Legal Update*, *supra* note 48, at 1 (discussing Board's rejection of university's argument that unionization would jeopardize academic freedom).

with the exception of students whose positions were fully funded by external grants.<sup>91</sup>

### iii. Revival of the Primary Purposes Analysis

With the ability to unionize under the NLRA, graduate students at private universities moved quickly to organize and collectively bargain with university administrators.<sup>92</sup> In July of 2004, after both a challenge by Brown University and a change in the composition of the Board to a Republican majority,<sup>93</sup> the Board reviewed a regional director's decision in *Brown University* and effectively overruled *NYU*.<sup>94</sup>

Returning to its primary purpose approach, the Board in *Brown* determined that graduate students were at the university for primarily educational reasons. Therefore, it held these students could not also be classified as employees under the

<sup>91</sup> *New York Univ.*, 332 N.L.R.B. at 1028 n. 10 (exempting fully funded departments where all doctoral students were guaranteed full funding for duration of their doctoral studies, in exchange for possible requirement of assistantship work performed by students); see also Rowland, *supra* note 19, at 959 (highlighting Board's finding that graduate student teaching assistants were employees entitled to protection under National Labor Relations Act); *Recent Case*, *supra* note 88, at 2558–59 (noting Board's holding).

<sup>92</sup> See *Legal Update*, *supra* note 48 (detailing how efforts at University of Pennsylvania, Brown University, and Columbia University were pursued immediately following *NYU* decision); see also Pope, *supra* note 2 (noting *NYU* as only private university to recognize graduate student union, where collective bargaining agreement resulted in forty percent stipend increase and improved health benefits for students). See generally Paul Salvatore & John F. Fullerton III, *The Legacy of the Clinton Labor Board*, METROPOLITAN CORPORATE COUNSEL, May 2001, at 9 (explaining effects of *NYU* and stating that it "opens the door to organizing campaigns, contract negotiations, and even strikes by individuals whose teaching duties universities have historically considered to be part of their graduate education and training rather than employment in the traditional sense").

<sup>93</sup> See Scott Smallwood, *Senators Get Mixed Messages at Hearing on Graduate-Student Unions*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 24, 2004 (discussing congressional hearing where one reason set forth for *Brown Univ.* decision was partisan politics); see also Tamara Loomis, *Power Shift NLRB Reversals May be on the Horizon, Bush Appointees will Overturn Key Labor Law Rulings, Experts Predict*, 24 NAT'L L.J. B11, B11 (2002) (commenting on President Bush's potential nominees for NLRB and impact nominations could have on "a slew of labor law decisions in the not-too-distant future"); Steven Greenhouse & Karen W. Arenson, *Labor Board Says Graduate Students at Private Universities Have No Right to Unionize*, N.Y. TIMES, July 16, 2004, at A14 (pointing out that *Brown University* was decided by "Republican-controlled board").

<sup>94</sup> *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*5 (2004) (overruling *New York University*); see also Kenneth R. Dolin, *The 'Brown' Decision*, 26 NAT'L L.J. 12, 12 (2004) (reporting overruling of *NYU*); Hutchens, *supra* note 1, at 116–17 (quoting President of Brown University, who stated that she would "fight as hard as [she] can to prevent the unions from entering the university on behalf of the students") (alteration in original).

Act.<sup>95</sup> However, the Board declined to decide whether its decision should overrule *Boston Medical Center*.<sup>96</sup>

In its interpretation of Section 2(3) of the Act, the Board focused on the Act's legislative history regarding the protection of workers in economic working relationships.<sup>97</sup> In direct contrast to NYU's majority, the *Brown* majority determined that the employee definition should not be literally read, and thus declined to apply the common law master/servant analysis.<sup>98</sup> It surmised that the Supreme Court only advocates a broad view of the employee definition in "fundamentally economic" relationships.<sup>99</sup> Additionally, it disagreed with the *Brown* dissent by asserting that, even if graduate students were employees under a common-law analysis, Congress *still* did not intend for them to garner employee status under the NLRA.<sup>100</sup> It

<sup>95</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*29 (concluding that graduate student teaching assistants' role is "primarily educational"); see also Dolin, *supra* note 94, at 12 (analyzing Board's rationale in *Brown University*); S. Richard Pincus, *NLRB Decision in Brown University: Graduate Student Assistants Have No Right To Engage in Collective Bargaining*, MONDAQ BUSINESS BRIEFING, Nov. 8, 2004 (indicating Board's decision depended on fact that graduate student teaching assistants retain mainly academic rather than economic relationship with school employer).

<sup>96</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*55 n.5 (asserting that "[t]he Board's decision today explicitly notes that it 'express[es] no opinion regarding' *Boston Medical Center*. We believe that *Boston Medical Center* was correctly decided"); see also Dolin, *supra* note 94, at 12 (suggesting *Boston Medical Center* would soon be overruled despite Board's failure to do so in *Brown University*); Pincus, *supra* note 95 (remarking on Board's failure to address *Boston Medical Center*).

<sup>97</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*27 (emphasizing Congress's focus on economic relations); see also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965) (stating purpose of Act is "to redress the perceived imbalance of economic power between labor and management"); Bryan M. Churgin, *Comment: The Managerial Exclusion Under The National Labor Relations Act: Are Worker Participation Programs Next?*, 48 CATH. U.L. REV. 557, 604 (1999) (noting Board and Supreme Court decision focus on interpreting congressional intent in similar labor cases).

<sup>98</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*27-28 (discounting dissent's contention that going beyond statute's text is to create exclusion not designated by Congress); see also Erickson & Sederstrom, P.C., *Employer Alert - Rules May Change Overnight*, NEB. EMP. L. LETTER, Aug. 2004 (noting Board overruled NYU case and did not apply master/servant test); Little, Medeiros, Kinder, Bulman & Whitney, P.C., *Learning, Not Unionizing, Is the Important Thing*, R.I. EMP. L. LETTER, Sept. 2004, (stating that Board overruled NYU decision and its reasoning).

<sup>99</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*43 (2004); see also Whiteford, Taylor & Preston L.L.P., *Disabled Workers in Primarily Rehabilitative Settings Aren't Statutory Employees*, MD. EMP. L. LETTER (Nov., 2004) (noting congressional intent to limit application of Act to these economic relationships). See generally Kevin J. Miller, *Welfare and the Minimum Wage: Are Workfare Participants "Employees" Under the Fair Labor Standards Act?*, 66 U. CHI. L. REV. 183, 184 (1999) (explaining how courts interpret the meaning of employee under the Supreme Court's "economic realities employment" test).

<sup>100</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*4; Whiteford, *supra* note 99 (stating Congress did not intend graduate students to be covered by Act).

analogized to those full-time faculty members who are also considered managerial employees, because these members may fit the definition of employee under a common-law analysis, but are still impliedly exempted from NLRA protection.<sup>101</sup>

In conducting its factual analysis, the Board noted that a student had to be enrolled at Brown to become a working assistant, most of a student's time was spent obtaining a degree, and money received by all working assistants was equal to that received by non-working fellows. As a result, money received by students was not based on the skill level necessary to perform the work, but rather solely because of enrollment in the graduate program.<sup>102</sup> As opposed to most of the NYU graduate students, the majority of Brown graduate students were required to work, which made assistantships integral to the educational process.<sup>103</sup> Because the work was essential to obtaining the degree, the Board rationalized that significant faculty oversight and control over the students was necessary.<sup>104</sup> Moreover, the Board observed that financial support was provided to students only while they were enrolled at the university, and such support was derived largely from the university's financial aid budget. Thus, the Board determined that the support was atypical of the type generally found in an employment relationship.<sup>105</sup>

The majority's policy views were directly in contrast to the dissent's statistically-based analysis, which elaborated on the majority positions presented in both *Boston Medical Center* and

<sup>101</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*42 (questioning dissent's rationale by referring to judicially implied exemption for "managerial employees" under Act because such employees fit within common-law master/servant relationship, yet have been excluded from Act's protection); see also *Nat'l Labor Relations Bd. v. Bell Aerospace*, 416 U.S. 267, 275–77 (1974) (using the term "managerial employee" but finding that these people were still not considered statutory employees); *Churgin*, *supra* note 97, at 558–59 (describing the managerial exclusion).

<sup>102</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*29;

<sup>103</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*30–32 (concluding that, because majority of graduate students were enrolled in departments requiring assistantships, such assistantships were directly related to educational reasons considered in student selection of Brown); Erickson, *supra* note 98 (stating that previous to NYU, role of graduate student assistants was primarily educational).

<sup>104</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*31–32 (2004) (stating that students generally did not do any work on independent basis and that faculty members providing such direction and control were often student dissertation advisors as well); Erickson, *supra* note 98 (emphasizing mentoring relationship between faculty and students).

<sup>105</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*33.

NYU.<sup>106</sup> Here, the majority felt that imposing a collective bargaining agreement on the academic environment would have a severely negative impact on “fundamental matters” typically decided by the university, including class size, time, length, and location.<sup>107</sup> It referred to prior Board precedent to explain the personal and individualized nature of student/teacher relationships, which necessitate unequal bargaining power to properly function.<sup>108</sup> Further, it contrasted NYU’s majority rationale by determining the primary purpose approach for graduate students was consistent with disabled individuals within a rehabilitation program, and that neither situation involved workers deserving of employee status.<sup>109</sup>

## II. WHY *BROWN* WAS WRONGLY DECIDED: THE CHANGING ACADEMIC ENVIRONMENT AND ECONOMIC INTERDEPENDENCE

### A. *Economic Interdependence Calls for Change*

Graduate student assistants should be analyzed on an individualized basis under the compensated services approach within the private university context.<sup>110</sup> It is conceded that a

<sup>106</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*5455 (presenting dissent’s support in NYU and Boston Medical Center); see also New York Univ., 332 N.L.R.B. 1205, 1205 (2000) (considering graduate students employees), *overruled by Brown Univ.* 342 N.L.R.B. No. 42 at \*36; *Boston Medical Ctr.*, 330 N.L.R.B. 152 (1999) (allowing medical interns form collective bargaining agreements although they were considered students).

<sup>107</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*37 (commenting that such educational decisions are personalized in nature for each individual student, as opposed to typical private sector employment situation, where there exists more logical collective interest); *St. Clare’s Hosp. and Health Ctr.*, 229 NLRB 1000, 1003 (1972) (presenting similar argument as *Brown* 25 years earlier), *overruled by Boston Medical Ctr.*, 330 N.L.R.B. at 152; Stuart Silverstein & Peter Hong, *Teaching Assistants Can’t Unionize*, L.A. TIMES, July 17, 2004 (noting mentoring experience between faculty and students is not subject of collective bargaining).

<sup>108</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*36 (discussing how teachers and students have mutual interest to advance student’s education, but that mutuality does not exist in employment context); *St. Clare’s Hosp. and Health Ctr.*, 229 NLRB at 1003 (presenting same argument 25 years prior to *Brown*).

<sup>109</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*41 (referring to *Goodwill Indus. of Tidewater, Inc.*, 304 N.L.R.B. 767 (1991)); *Goodwill Indus. of Denver, CLC*, 304 N.L.R.B. 764 (1991); *Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961 (1960)).

<sup>110</sup> See generally *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (deciding that determination of employee status should be based upon common-law master/servant principles); *Brown Univ.*, 342 N.L.R.B. No. 42, at \*71 (discussing various changes occurring within educational landscape that have changed this area of employee debate).



student primarily attends a university to obtain a degree and that the existing working relationship is not "fundamentally economic," as required by the *Brown* majority for providing employee status.<sup>111</sup> However, the modern working relationship between a graduate student worker and his or her university administration has become significantly pervaded by mutual economic interest and interdependence.<sup>112</sup> As a result, economic status should be considered under the common-law analysis, causing the parties' relationship to more likely fall within the economic purview of the NLRA.

In *Brown University*, the dissenting opinion's evidence of a changed academic environment strongly indicates that work-related issues play a larger part in a graduate student's campus life.<sup>113</sup> Within recent years, private universities have increased tuition ahead of inflation rates.<sup>114</sup> Along with such increases, universities have made cutbacks in educational programs for the sake of their own financial well-being.<sup>115</sup> As part of this fiscally

<sup>111</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*43 (deciding that Brown graduate student assistants were not involved in fundamentally economic relationship with institution); see also *NLRB v. Town & Country Electric*, 516 U.S. 85, 98 (1995) (finding workers at issue to be statutory employees in situation of fundamentally economic character); *Sure-Tan v. NLRB*, 467 U.S. 883, 893-94 (classifying workers at issue as statutory employees within fundamentally economic relationship).

<sup>112</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*53 (stating that majority's decision is "woefully out of touch with contemporary academic reality."); see also Karen W. Arenson, *Pushing for Union, Columbia Grad Students Are Set to Strike*, N.Y. TIMES, Apr. 17, 2004, at A-11 (discussing plight of graduate students at Columbia University); Attorney General, *supra* note 3, at 1 (quoting New York State Attorney General Eliot Spitzer, "[t]he decision is wrong. The Labor Board is doing everything-left, right, and center-designed to undercut workers' rights to organize.").

<sup>113</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*71 (Liebman, M. and Walsh, M., dissenting) (suggesting that majority is closing its eyes to changes in academia); see also Tamara Loomis, *Student Union, NLRB Recognizes Right to Organize at NYU*, N.Y.L.J., Nov. 16, 2000, at 5 (stating that NLRB is finally recognizing students' status as workers and their right to organize and negotiate as union); John P. Furfaro & Maury B. Josephson, *Residents and Students Organizing at Increasing Rates*, N.Y.L.J., April 5, 2001, at 3 (noting there has been growing trend among medical students and interns to organize into unions).

<sup>114</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*72 (Liebman, M. & Walsh M., dissenting) (quoting Jacques Barzun's warning that universities have taken on characteristics of a large corporation); Megan Rooney, *Many Private Colleges Plan to Raise Tuition at a Rate Exceeding Inflation and Recent Increases*, CHRON. OF HIGHER EDUC., May 9, 2003, at 35 (indicating students will be paying more for private college tuition than ever before while faculty salaries are not appropriately increased and university programs are cut).

<sup>115</sup> See Derek Bok, *Academic Values and the Lure of Profit*, CHRON. OF HIGHER EDUC.; CHRON. REV., April 4, 2003, at 7 (conveying how financial struggles at universities are causing universities to seek alternative ways to raise money in order to remain competitive with other schools); Rooney, *supra* note 114, at 35 (quoting Richard Ekman, President of the Council of Independent Colleges, "[s]chools take affordability very

responsible mindset, university administrators have increasingly relied on student workers as a cost-effective way of avoiding higher wages demanded by full-time or part-time faculty members.<sup>116</sup> Conversely, students increasingly rely upon universities to pay higher compensation in the face of rapidly increasing tuition rates and daily living needs.<sup>117</sup>

This mutual reliance is similar to the relationship between universities and part-time faculty members.<sup>118</sup> As graduate student assistants have been increasingly used in place of faculty members to save money, part-time faculty members are also used as a cost-cutting measure.<sup>119</sup> Both groups receive low salaries for work performed, little to no fringe benefits, and neither is on a tenured track.<sup>120</sup> These factors are highly attractive to a university from an economic standpoint.<sup>121</sup>

seriously . . . It's a balancing act. I worry about how far this cost management can go before it starts to affect the quality of education"; Nancy Kercheval, *MD's Community Colleges Battling to Survive Declining Funding and Rising Enrollment*, DAILY RECORD, July 25, 2003, at 1 (noting some cutbacks involve cancellation of under-enrolled classes and deferment of overtime).

<sup>116</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*73 (Liebman, M. & Walsh M., dissenting) (noting that in December, 2000, twenty-three percent of college instructors were graduate teaching assistants); Arenson, *supra* note 112, at A-11 (indicating that graduate students teach more than half of core courses that Columbia students are required to take); Bok, *supra* note 115, at 7 (discussing various ways in which universities must be more entrepreneurial in order to raise funds, while not negatively impacting educational experience provided).

<sup>117</sup> See *Recognition and Respect*, *supra* note 5, at 5 (stating "[u]ltimately, what perhaps is most telling is that if graduate employees did not do the teaching and other work they do for universities, those institutions would necessarily have to hire more part-time or full-time faculty to cover courses, discussion sections and labs that graduate employees currently cover"); Pope, *supra* note 2 (expressing students' view that Board simply did not account for fact that graduate students teach more in today's academic environment, it takes longer to obtain degrees, and, as a result, students are more likely to have families to support); Ben Johnson & Tom McCarthy, *Graduate Student Organising at Yale and the Future of the Labor Movement in Higher Education*, SOC. POLY, June 22, 2000, at 11 (increasing number of graduate students are teaching at universities).

<sup>118</sup> See Duncan, *supra* note 5, at 529 (relaying view of university administrators that part-time faculty members enable school to have large degree of flexibility with staffing and course offerings while also controlling costs); Johnson, *supra* note 117, at 11 (noting that fewer professors are needed due to increasing trend towards graduate students teaching classes).

<sup>119</sup> See Duncan, *supra* note 5, at 529 (noting university advantages from use of part-time faculty members); Johnson, *supra* note 117, at 11 (hiring graduate students leads to overall decrease in costs universities have to spend of teaching salaries); see also *Treat Part-Time Faculty More Fairly if You Want to Improve Program Quality*, HR ON CAMPUS, April 19, 2001, at 1 (stating "[p]art-time faculty members don't have benefits, security, good wages or respect").

<sup>120</sup> See Duncan, *supra* note 5, at 528 (indicating how benefits are rarely provided to part-time faculty); *Recognition and Respect*, *supra* note 5, at 7 (stating that most graduate students are not provided with health insurance and do not earn enough money to afford

While a part-time faculty member typically works to earn money and often support a family, a student works primarily to pay tuition.<sup>122</sup> Although specific reasons for working might differ, both parties ultimately work with a broader economic purpose in mind. Graduate students, like part-time faculty members, need to maintain a standard of living.<sup>123</sup> This becomes far more difficult to achieve when large portions of a student's meager earnings go towards increasingly high-priced tuition.<sup>124</sup> In addition, even though an individual does not have to attend a graduate program to earn money, there are many professions, such as law and medicine, which require a graduate degree to practice.<sup>125</sup> If students are unable to afford tuition because they

such insurance without additional assistance); Kavanagh, *supra* note 52, at 24 (stating part-time faculty are rarely given same benefits as full-time staff).

<sup>121</sup> AASCU Data Cited in Criticism of Growing Trend to Hire Part-Time Faculty, HR ON CAMPUS, Feb. 1999, at 1 (citing AASCU study statistics indicating part-time faculty are paid less and receive fewer benefits than full-time counterparts); Kavanagh, *supra* note 52, at 24 (stating "[b]etween 1975 and 1993, adjunct faculty grew four times more (97 percent) than full-time faculty (25 percent) and now makes up more than 33 percent of the academic labor force").

<sup>122</sup> See Duncan, *supra* note 5, at 529 (commenting that many part-time teachers currently rely on wages earned as primary means of supporting standard of living); Pope, *supra* note 2 (expressing students' view that Board did not account for fact that graduate students are also more likely to have families to support); *Recognition and Respect*, *supra* note 4, at 7 (stating that doctoral students average seven years within graduate program, which indicates these students are more likely to have families to support when they actually obtain their degree).

<sup>123</sup> See generally Roger Blanpain, 1992 and Beyond: The Impact of the European Community on The Labor Law Systems of the Member Countries, 11 COMP. LAB. L.J. 403, 405 (1990) (acknowledging one major problem for developing states is preserving a high standard of living); Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599, 1599 (1993) (discussing how, since colonial times, United States had enjoyed high standard of living); Mimi Sharamitaro, *The Federal Tax System and Treatment of Scholarships for Graduate Students: Should Scholarships Be Taxed?*, 48 ST. LOUIS U. L.J. 1501, 1520 (2004) (establishing education is key to higher standard of living).

<sup>124</sup> See *Recognition and Respect*, *supra* note 5, at 7 (indicating graduate employees typically earn only sixty-four percent of living expenses, thus driving them to incur large sums of loan debt). See generally Alison T. Fenton, *Making the Grade - Can Pennsylvania's Private Colleges and Universities Pass the Pennsylvania Supreme Court's Test of a Purely Public Charity?*, 33 DUQ. L. REV. 655, 670 (1995) (claiming that due to increase in tuition costs, many students finance their education); Judith G. McMullen, *Father (or Mother) Knows Best: An Argument Against Including Post-Majority Educational Expenses in Court-Ordered Child Support*, 34 IND. L. REV. 343, 346 (2001) (stating since 1980, average tuition at four-year institutions has more than doubled).

<sup>125</sup> See generally Linda R. Crane, *Interdisciplinary Combined-Degree and Graduate Law Degree Programs: History and Trends*, 33 J. MARSHALL L. REV. 47, 52 (1999) (acknowledging that graduate law degree programs and interdisciplinary combined-degree programs provide law students with opportunities to meet their challenges); Edgar G. Epps, *Affirmative Action in The Classroom: Affirmative Action and Minority Access to Faculty Positions*, 59 OHIO ST. L.J. 755, 758 (1998) (claiming students who earn degrees from highly ranked undergraduate institutions are likely to attend highly ranked graduate schools); Sharamitaro, *supra* note 123, at 1505 (establishing graduate level

are inadequately compensated, then it is logical to conclude that students are potentially being denied the opportunity to pursue a career path that will determine their overall economic status for the remainder of their working lives.

A university often creates situations where it has significant control over both a student's work and compensation.<sup>126</sup> If a student wants to continue pursuing a degree from a private university, he or she is essentially compelled to work and may even be required to do so under university curriculum standards in order to graduate.<sup>127</sup> While training doctoral students to become teachers is important and provides a degree of educational benefit, a university's substantial economic reliance upon this work suggests there is more to this relationship than merely training students for a future career.<sup>128</sup> For instance, universities often have students perform administrative activities other than teaching and researching, which appear unrelated to obtaining a graduate degree.<sup>129</sup>

courses normally are taken by individuals pursuing programs leading to law, business, or medical degrees).

<sup>126</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*31-32 (2004) (detailing how virtually all work is under control of faculty members and university). See generally Laurie J. Bassi and Jens Ludwig, *School-To-Work Programs in the United States: A Multi-Firm Case Study of Training, Benefits, and Costs*, 53 INDUS. & LAB. REL. REV. 219, 220 (2000) (claiming there are several possible market imperfections that complicate prospects for school-to-work training programs in United States); David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 228 (1998) (stating use of graduate assistants allows universities to deny workers benefits, job security, and voice).

<sup>127</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*11 (indicating assistantships were integral part of obtaining graduate degree). See generally Sabrina A. Hall & Tammy R. Wavle, *A Vision of the Future: Mandatory Pro Bono Programs in Texas Law Schools*, 38 HOUSTON LAWYER 18, 19 (2001) (claiming that students sense obligation to work); Katherine E. Malmquist, *Managing Student Assistants in the Law Library*, 83 L. LIBR. J. 301, 301 (1991) (acknowledging library supervisors need to look at student workers in different light than permanent employees).

<sup>128</sup> See generally Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1706 (1993) (explaining students must sign agreement obligating them to follow through on any projects to which they may ultimately be assigned); Hall, *supra* note 127, at 19 (students work pro bono while involved in clinics); Malmquist, *supra* note 127, at 301-02 (noting that work performance is directly related to expectations of supervisor).

<sup>129</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*10-11 (detailing how graduate students with proctorships perform variety of duties for university departments and administrative offices); Pope, *supra* note 2 (discussing how graduate students not only teach classes, but also grade papers and advise students). See generally Malmquist, *supra* note 127, at 301 (acknowledging that law school library student workers are considered "temporary help" and are assigned monotonous tasks, including shelving, picking up after patrons, checking items in and out, and working long evening and weekend hours when most of library staff are off).

Recognizing the substantial economic aspects running throughout this working relationship, federal courts have applied similar forms of the compensated services analysis in the context of claims under Title VII of the Civil Rights Act of 1964.<sup>130</sup> It is not disputed that different interpretations of the term "employee," as defined within separate federal statutes, are permissible.<sup>131</sup> However, Title VII's language is largely adopted from the NLRA and federal courts often look to the NLRA for guidance in Title VII claims.<sup>132</sup> As a result, the use of essentially the same test in a Title VII claim as that applied in *NYU* further reinforces the notion that a student's primary purpose is not the relevant inquiry when economic interdependence dominates the student/university relationship.<sup>133</sup>

Title VII, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin, is arguably the most important part of the Civil Rights Act of 1964.<sup>134</sup> The intent of Congress in enacting the statute was to "achieve

<sup>130</sup> See 42 U.S.C. § 2000e-2 (2004) (detailing unlawful employment practices); *Cuddeback v. Florida Bd. of Educ.*, 381 F.3d 1230, 1234 (11th Cir. 2004) (applying common-law/economic realities test, which analyzes all aspects, including economic attributes, existing in working relationship between student and university).

<sup>131</sup> See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 342 (1992) (conveying there is no exact formula for defining employee status). See generally Gina M. Delahunt, *Pointing Fingers – Will the Real Employer Please Stand Up! When is an Entity an Employer in a Sexual Harassment Claim?*, 7 J. SMALL & EMERGING BUS. L. 501, 505–06 (2003) (stating use of workers who do not fit traditional employee model has greatly increased in last twenty years); *Deb Lussier, Oncale v. Sundowner Offshore Services Inc. and the Future of Title VII Sexual Harassment Jurisprudence*, 39 B.C. L. REV. 937, 943 (1998) (noting within sex discrimination context, employee is member of protected group simply by being man or woman).

<sup>132</sup> See Mitchell H. Rubinstein, *The Use of Pre-discharge Misconduct Discovered After an Employees' Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 12 (1990) (stating many courts dealing with various areas of labor law outside of NLRA, particularly employment discrimination, frequently look to NLRB decisions because NLRA "is the grandparent of most labor laws"). See generally Frank Balzano, *Sextraterritorial Application of the National Labor Relations Act*, 62 U. CIN. L. REV. 573, 583 (1993) (stating that Court's position is very important for understanding extent of jurisdiction under NLRA); *Andrew S. Lewinter, Hoffman Plastic Compounds v. NLRB: An Invitation to Exploit*, 20 GA. ST. U. L. REV. 509, 525 (2003) (claiming Congress intended NLRA remedies to redress employee's harm).

<sup>133</sup> See Delahunt, *supra* note 131, at 505–06 (discussing use of workers who do not fit traditional employee model); Lussier, *supra* note 131, at 943 (establishing employee must belong to protected group).

<sup>134</sup> See Chapter 21: *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin: Civil Rights Act of 1964 Title VII, as Amended through 1991*, 42 U.S.C. §§2000e-17, MATTHEW BENDER, 4–21 CIVIL RIGHTS ACTIONS P. 21.01 (2004) (detailing how Kennedy administration originally did not want Civil Rights Act to include provision on private employment and that bill itself was subjected to extensive review in order to ensure minimal impact on nation's businesses).

equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”<sup>135</sup>

As with fundamental rights derived from the NLRA and other federal employment statutes, fundamental rights derived from Title VII are dependant upon employee status.<sup>136</sup> Under Title VII, an “employee” is defined as “an individual employed by an employer.”<sup>137</sup> This language is similarly inconclusive to the NLRA’s definition, allowing federal courts to exercise wide discretion in determining status on a case-by-case basis.<sup>138</sup>

For instance, in *Cuddeback v. Florida Board of Education*,<sup>139</sup> the United States Court of Appeals for the Eleventh Circuit applied an “economic reality” test to hold that the graduate student assistant at issue was an employee under Title VII.<sup>140</sup> The analysis conducted by the circuit court was similar to the Board’s application of the compensated services approach in that it applied common-law concepts, but also considered the economic position of the parties as well. Although much of the plaintiff’s research was performed in the lab of a university professor who provided funds for the plaintiff to satisfy her lab-work, publication, and dissertation requirements, the circuit court focused on the following facts:

- (1) she received a stipend and benefits for her work, as well as leave time; (2) a comprehensive collective bargaining agreement governed her relationship with the university; (4)

<sup>135</sup> *Griggs v. Duke Power Company*, 401 U.S. 424, 429–30 (1971).

<sup>136</sup> See 42 U.S.C. § 2000e-2 (2004) (addressing unlawful employment practices); see also Carlson, *supra* note 9, at 363–64 (indicating employee status is basis for determining who is subject to Title VII protection). But see Thomas Joshua R. Archer, *The Structure of a Title VII Action Against a College for the Enforcement of NCAA Proposition 48*, 2 SPORTS LAW J. 111, 114 (1995) (noting employee status is not threshold requirement for bringing Title VII action).

<sup>137</sup> 42 U.S.C. § 2000e(f) (2004); see also Keith Hightet and George Kahale III, *Equal Employment Opportunity Commission v. Arabian American Oil Co.* 111 S.Ct. 1227, 85 AM. J. INT’L. L. 552, 557 (1991) (describing Title VII’s definition of “employee”). See generally Carlson, *supra* note 9, at 364 (suggesting required employee number relieves burden on smaller employers to handle Title VII claims).

<sup>138</sup> See Carlson, *supra* note 9, at 368 (stating “the borders of any test of employee status are destined to remain forever vague”); see also Leigh Pokora, *Partners as Employees Under Title VII: The Saga Continues, A Comment on the State of the Law*, 22 OHIO N.U. L. REV. 249, 249 (1995) (noting “employee” is poorly defined by Title VII). See generally Hightet, *supra* note 137, at 557 (describing Title VII’s definition of “employee”).

<sup>139</sup> 381 F.3d 1230 (11th Cir. 2004).

<sup>140</sup> See *id.* at 1234 (revealing issue of graduate student assistant’s status as employee was question of first impression for circuit court).

the university provided equipment and training; and (5) the decision to renew her appointment was based on employment reasons, such as attendance and communication problems, rather than academic reasons.<sup>141</sup>

The court pointed out that other courts considering whether graduate students constitute employees under Title VII have "typically refused to treat them as 'employees' . . . only where their academic requirements were truly central to the relationship with the institution."<sup>142</sup> Concluding that the plaintiff's academic requirements were not truly central based on the particularized facts considered, the court concluded that, even though the plaintiff's work obligations were performed mainly to fulfill university program requirements, she was an employee under Title VII.<sup>143</sup>

With economic interdependence prevailing throughout the university landscape, it is important to discuss competing policy arguments advocating the primary purpose approach over the seemingly more appropriate compensated services analysis. This discussion will demonstrate why such competing arguments fail in comparison to the overwhelming need for student protection under the NLRA in the modern academic environment.

### *B. Academic Freedom and Student/Teacher Relationships*

Analyzing whether interference with academic freedom would occur necessitates an examination of what should be open to collective bargaining within the educational context. Opponents of graduate student collective bargaining primarily fear that collective bargaining will permit students to negotiate for both mandatory issues of wages, hours, and conditions, and

<sup>141</sup> See *Cuddeback*, 381 F.3d at 1234–35.

<sup>142</sup> *Id.* See *Stilley v. Univ. of Pittsburgh of the Commonwealth Sys. Of Higher Educ.*, 968 F. Supp. 252, 261 (W.D. Pa. 1996) (holding plaintiff was employee when she was acting as student researcher); see also *Jacob-Mua v. Veneman*, 289 F.3d 517, 520–21 (8th Cir. 2002) (finding no employee status for volunteer graduate student researcher who received no financial compensation for work performed).

<sup>143</sup> See *Cuddeback v. Florida Board of Edu.*, 381 F.3d 1230, 1235 (11th Cir. 2004). (stating that "district court correctly found *Cuddeback* was an employee for Title VII purposes"); see also *Troy Ferguson, Partners as Employees Under the Federal Employment Discrimination Statutes: Are the Roles of Partner and Employee Mutually Exclusive?*, 42 U. MIAMI L. REV. 699, 706 (1988) (describing "economic realities" test); *Rebecca Luchok, Coming of Age in the Professional Corporation: Liability of Professional Corporations for Dismissal of Members under the Age Discrimination in Employment Act*, 48 U. PITT. L. REV. 1185, 1211 (1987) (noting significance of "economic realities" test).

inappropriately for education-specific matters such as grades, courses, and professors.<sup>144</sup> Supporters of student collective bargaining believe that both parties are intelligent and sophisticated enough to decide what matters are subject to negotiating, without attempting to engage in any sort of power abuse.<sup>145</sup> For instance, the recently expired NYU collective bargaining agreement contained a provision stating, “[d]ecisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.”<sup>146</sup> Further, the Brown dissent significantly noted that collective bargaining in the public university context has not harmed academic freedom, and, by correlation, would not harm freedom in the private context.<sup>147</sup>

Closely related to worries regarding academic freedom is the fear that student/teacher relationships will deteriorate if student collective bargaining is permitted under the Act.<sup>148</sup> If recognizing

<sup>144</sup> Brown Univ., 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*37 (July 13, 2004) (stating that collective bargaining at Brown would intrude upon decisions more fundamental to university functioning and policy making, such as who, what, and where to teach or research). See *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1003 (1977) (prophesizing that once academic freedoms are open to negotiation, “[b]oard involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away”), *overruled by Boston Medical Ctr.*, 330 N.L.R.B. 152, 152 (1999); see also Hayden, *supra* note 7, at 1263 (criticizing argument that allowing graduate students to bargain collectively will disrupt student-faculty relations).

<sup>145</sup> See *Boston Medical Ctr.*, 330 N.L.R.B. at 164 (noting such problems are not “insurmountable” and that negotiating parties are not novices to bargaining process). See generally Hayden, *supra* note 7, at 1264 (arguing in favor of collective bargaining rights for graduate students); Hutchens, *supra* note 1, at 130 (discussing dual role of graduate student employees).

<sup>146</sup> *Collective Bargaining Agreement between New York University and International Union, UAW, AFL-CIO and Local 7902, Adjuncts Come Together, UAW*, (May 20, 2004 – August 31, 2010), <http://www.nyu.edu/hr/pdf/forms/adjunct.pdf>, at 38–39 (containing recently expired NYU collective bargaining agreement).

<sup>147</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*79 (Liebman, M. and Walsh M., dissenting) (emphasizing how evidence goes against majority’s academic freedom argument). See generally Hayden, *supra* note 7, at 1263 (arguing that providing graduate students with right of collective bargaining does not affect faculty-student relations because students would be bargaining with university administrators, rather than faculty); Hutchens, *supra* note 1, at 125 (suggesting that providing graduate students with collective bargaining rights would have little impact on faculty-student relations).

<sup>148</sup> See *Brown*, 342 N.L.R.B. at \*36 (detailing importance of student/teacher relationship on campus and how shifting focus from educational to economic context will severely hamper the effectiveness of such relationship); *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. at 1002 (noting student/teacher relationship is not within same realm as employee/employer relationship); see also Hutchens, *supra* note 1, at 124–25 (commenting on how faculty members who resist such unionization feel that relationships with students will be undermined if students have ability to bargain on issues related to their education).



a student bargaining unit would prohibit faculty members from properly conducting their roles as professors and advisors, then granting employee status would be improper.<sup>149</sup> However, without such interference there is no need to fear the destruction of the relationship.

Defenders of academic freedom note that the personal nature of the student/teacher relationship necessitates unequal bargaining power in an individualized setting for professors to properly fulfill their primary role as educators.<sup>150</sup> However, it has been accurately observed that bargaining does not occur between teachers and students, but rather between students and university administrators.<sup>151</sup> Although not wholly conclusive on this point, two recently conducted studies demonstrate there is little to no harm done to the student/teacher relationship by allowing students to collectively bargain as employees.<sup>152</sup>

<sup>149</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*34-35 (2004) (citing *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. at 1003 (detailing negative implications of collective bargaining on student/teacher relationship)); see also *Ass'n of Graduate Student Employees v. Pub. Employment Relations Bd.*, 8 Cal. Rptr. 2d 275, 282-83 (Cal. App. 1st Dist. 1992) (deferring to opinion of PERB that granting employee status could lead to damaging the mentor relationship between professors and students). See generally, Gartland, *supra* note 24, at 633 (noting "the relationship developed in an academic situation is unique to academia and differs greatly from the employer-employee relationship").

<sup>150</sup> See Hayden, *supra* note 7, at 1263 (commenting that seemingly delicate balance existing in student/teacher relationship would not be impaired by adversarial nature of collective bargaining between student and university); see also Gartland, *supra* note 24, at 633 (recognizing "[c]oncern that collective bargaining would undermine the 'personal' nature of the student-teacher relationship recalls the same paternalism that once granted industrial employers greater power over employees"). See generally Rohrbacher, *supra* note 6, at 1888 (finding cases rejecting argument that "granting collective bargaining rights to . . . student employees would interfere with academic policy and result in difficult and protracted efforts to define the scope of representation in relation to academic matters").

<sup>151</sup> See Hayden, *supra* note 7, at 1263 (stating faculty members are simply another class of employees that are often involved with their own collective bargaining processes); see also Rohrbacher, *supra* note 6, at 1912 (observing that "the reality . . . is that the student-teacher and employee-supervisor relationships are separate"). But see Gartland, *supra* note 24, at 641 ("introducing core elements of graduate level education to a bargaining process would turn the entire educational system on its ear, hindering higher education in the process").

<sup>152</sup> See *Graduate-Student Unions Don't Hurt Professor-Advisee Relations, Survey Finds*, CHRON. OF HIGHER EDUC., Nov. 5, 1999, at A18 (revealing that ninety percent of three hundred faculty members from five universities with collective bargaining for graduate assistants stated how there was no interference with advising students due to union's existence, and that ninety-two percent indicated that ability to instruct graduate students was not affected); Daniel J. Julius & Patricia J. Gumpert, *Graduate Student Unionization: Catalysts and Consequences*, 26 REVIEW OF HIGHER EDUC. NO. 2, 187, 196 (2002) (analyzing gathered data to suggest that student/teacher relationship might actually be enhanced by existence of collective bargaining); cf., Rohrbacher, *supra* note 6, at 1912 (holding "interposition of a TA union into the economic employee-supervisor

As a result, with economic interdependence on the rise, it is improper for universities to have such a strong upper hand over students merely because of claims of interference with academic freedom and student/teacher relationships.<sup>153</sup> Regardless of the fact that such negative results have been disproven or can be easily avoided through intelligent and thoughtful negotiating, these are secondary concerns that should not stand in the way of students' overall well being.<sup>154</sup> Collective bargaining is the most appropriate and fair way to effectuate the goals of each party, because it allows universities to continue relying on low-cost student services while simultaneously providing students with fair treatment.<sup>155</sup>

Moreover, there is no requirement within the NLRA that an agreement be reached between parties, but rather only a requirement of collective bargaining in an effort to reach an agreement.<sup>156</sup> Therefore, along with parties' ability to decide

relationship therefore does not, as a rule, intrude upon the educational student-teacher relationship").

<sup>153</sup> See *Attorney General*, *supra* note 3, at 1 (indicating how students are going into debt due to low salaries and inability to bargain for fair standards); *Brown Univ.*, 342 N.L.R.B. No. 42, at \*71 (Liebman, M., dissenting) (discussing how workplace related issues are now very common among student workers); Rowland, *supra* note 19, at 957 (finding "[e]xpressed fear that collective bargaining would engender a legion of problems ranging from strikes to intrusion into the preserves of academic freedom has proven unfounded").

<sup>154</sup> See Rohrbacher, *supra* note 6, at 1907 (noticing economic interests are on mind of student); see also Rowland, *supra* note 19, at 947-48 (observing "critics of unionization, both inside and outside the university, fret that graduate student unions will employ the techniques of collective action - from negotiating to striking - to intrude upon the universities' rights to set degree requirements, evaluate student progress and control curriculum"). But see Gartland, *supra* note 24, at 641 (stating graduate students gaining right to organize "would ignore the decades of knowledge and experience with higher education that professors and deans have, and consolidate much of the power over critical decisions into the hands of naïve and inexperienced recent college graduates").

<sup>155</sup> See *Recognition and Respect*, *supra* note 5, at 8 (deeming fair nature of collective bargaining will improve overall educational environment as seen with more than twenty graduate employee unions in both public and private sector universities); see also Douglas Sorrelle Streitz & Jennifer Allyson Hunkler, *Teaching or Learning: Are Teaching Assistants Students or Employees?*, 24 J.C. & U.L., No. 2, 349, 374 (1997) (observing average tenure track professors at Yale earns substantially more money than a Yale teaching assistant). See generally Rohrbacher, *supra* note 6, at 1849-50 (finding examples of universities that are increasingly relying on cheap labor of teaching assistants).

<sup>156</sup> See 29 U.S.C. § 151, 151 (1935) (stating "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . ."); see also Rohrbacher, *supra* note 6, at 1910 (arguing "[n]o statutory provisions are needed to enable the NLRB to keep academic issues out of collective bargaining over terms and conditions of TA and RA employment"); cf. Rowland, *supra* note 19, at 951 (finding that "the NEA's current statement on academic freedom asserts

what is inappropriate for bargaining, universities are provided with the protection necessary to prevent interference with academic freedom.<sup>157</sup> With the existence of approximately twenty graduate student unions in the public sector, it is clear that collective bargaining can exist between teachers and students without ruining the integrity and prestige running throughout the esteemed halls of private institutions.<sup>158</sup>

### *C. Comparison to Disabled Individuals Within Rehabilitation Programs*

As previously discussed, the Supreme Court determined that collective bargaining cannot be easily imposed onto a primarily academic situation,<sup>159</sup> while the Board noted a similar position in *Brown University* with regards to a primarily rehabilitative situation.<sup>160</sup> When analyzed in correlation with congressional policies regarding the NLRA, the Board has determined that

at the outset that the support of academic freedom rights is added by the presence of collective bargaining").

<sup>157</sup> See *Boston Medical Ctr.*, 330 N.L.R.B. 152, 166 (1999) (stating "[i]f there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy"). *But see* Rohrbacher, *supra* note 6, at 1908 (observing "the inevitable change in emphasis from quality education to economic concerns which would accompany injection of collective bargaining into the student-teacher relationship would . . . prove detrimental to both labor and educational policies" and that "many academic freedoms" and "other academic prerogatives" would become mandatory subjects of collective bargaining").

<sup>158</sup> See *Recognition and Respect*, *supra* note 5, at 9 (discussing successes of various graduate student unions, including securing of effective workload provisions and seniority-based pay scale in collective bargaining agreement at University of Michigan); see also Martin H. Malin, *Student Employees and Collective Bargaining*, 69 KY. L.J. 1, 28 (1980) (observing "concern that student unions will misuse the collective bargaining process to the detriment of their educational institutions . . . raises issues regarding the scope of collective bargaining rather than the applicability of the N.L.R.A. to student employees"). *But see* Panchyshyn, *supra* note 40, at 121 (observing some cases where argument was that collective bargaining between teachers and students was against public policy).

<sup>159</sup> See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980) (explaining why collective bargaining cannot be easily imposed); see also Rohrbacher, *supra* note 6, at 1907 (discussing pitfalls, such as sour relationships between students and mentors). See generally Gartland, *supra* note 24, at 623 (observing "a lively debate in labor law has developed around the question of how the law, and more specifically the National Labor Relations Act ('NLRA') should treat increasingly unwieldy bargaining groups").

<sup>160</sup> See *Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 765-66 (1991) (holding workers within a rehabilitation program were not statutory employees); *Goodwill Indus. of S. California*, 231 N.L.R.B. 536, 537-38 (1977) (stating that employer's objective and workers' need for protection is not typical of that normally within NLRA jurisdiction), *overruled by* *Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 765 (1991); *Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961, 962 (1960) (holding that Board lacked jurisdiction where relationship was primarily rehabilitative).

neither the situation of graduate students in a private university nor disabled individuals in a rehabilitative program can easily be classified as an employment relationship deserving of NLRA protection.<sup>161</sup> As a result, it has recently applied the primary purpose approach to both situations.

Subsequent to the Board's decision in *Brown University*, the Board applied the primary purpose approach in *Brevard Achievement Center, Inc. and Transport Workers Union of America, Local 525, AFL-CIO* ("*Brevard*").<sup>162</sup> In *Brevard*, the Board held that disabled individuals working for a nonprofit corporation, which provided rehabilitation, training, and educational services, were not employees within the meaning of the Act.<sup>163</sup> As part of the Brevard program, the company could compete for federal contracts as long as at least seventy-five percent of the "man-hours of direct labor" were completed by individuals with "severe disabilities."<sup>164</sup>

As it did in *Brown University*, the Board looked beyond the language of Section 2(3) to congressional intent behind the Act.<sup>165</sup> Although all of the workers at Brevard, including both disabled and non-disabled individuals, performed the same janitorial and custodial tasks, worked the same hours, received

<sup>161</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42 at \*41 (stating Board's longstanding rule with regards "primarily rehabilitative" relationships is consistent with congressional policies for determining outer boundaries of statutory employee status); *S. Cal.*, 231 N.L.R.B. at 537 (explaining abnormal employer-client relationship which creates rare concerns for employee's health); *Sheltered Workshops*, 126 N.L.R.B. at 963 (distinguishing rehabilitative program's purpose of providing "therapeutic assistance" with normal employment opportunities).

<sup>162</sup> 342 N.L.R.B. No. 101, 2004-2005 NLRB Dec. (CCH) ¶ 16,762 (Sept. 10, 2004).

<sup>163</sup> See *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. No. 101, 2004-2005 NLRB Dec. (CCH) ¶ 16,762, at \*3 (2004) (agreeing with employer's contention that disabled workers were not employees under Act); *Denver*, 304 N.L.R.B. at 765-66 (holding workers in this rehabilitative facility were not employees); *Goodwill Indus. of Tidewater*, 304 N.L.R.B. 767, 768 (1991) (explaining because workers did not have to worry about production, and their jobs focused on therapy, they were not considered employees under Act).

<sup>164</sup> See *Brevard*, 342 N.L.R.B. No. 101 at \*2-3 (defining "severe disabilities" within Javits Wagner O'Day Act, 41 U.S.C. § 46 (2004), as "[a] person other than a blind person who has a severe physical or mental impairment (a residual, limiting condition resulting from an injury, disease, or congenital defect) which so limits the person's functional capacities (mobility, communication, self-care, self-direction, work tolerance or work skills) that the individual is unable to engage in normal competitive employment over an extended period of time").

<sup>165</sup> See *Brevard*, 342 N.L.R.B. No. 101 at \*15-16 (indicating interpretation of Section 2(3) must account for NLRA's overall congressional policies); see also *Yeshiva Univ.*, 444 U.S. at 681 (noting broad meaning of Section 2(3) is subject to interpretation); *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267, 277 (1974) (explaining, even though managerial employees were not excluded from meaning of employee, they would still not be considered statutory employees).

the same benefits, and earned the same wages, the Board denied the disabled workers employee status because they had access to a therapist at the job site, were provided with assistance in their daily living activities, and were virtually exempt from any sort of discipline or deadlines.<sup>166</sup> In addition, the Board noted that disabled individuals have the right to employee status, but not when the environment is primarily rehabilitative.<sup>167</sup> Once these disabled individuals completed their program, they were entitled to work for an employer in a traditional industrial setting falling within the protected purview of the Act.<sup>168</sup>

Further, the Board stressed that it had never exerted jurisdiction over primarily rehabilitative relationships, a federal court had never decided otherwise, and Congress had taken no action to reprimand or amend the way in which the Board applies the primary purpose approach to a rehabilitative scenario.<sup>169</sup> Finally, the Board indicated that collective bargaining in this type of relationship would ruin the effectiveness and functioning of rehabilitative programs for disabled individuals.<sup>170</sup>

<sup>166</sup> See *Brevard*, 342 N.L.R.B. No. 101 at \*20–23 (finding counseling/rehabilitation mode of service exists where program encourages disabled individuals to work through problems that occur with non-mandatory counseling and additional training, rather than through discipline that non-disabled worker would receive if his work was not of expected quality).

<sup>167</sup> See *Brevard*, 342 N.L.R.B. No. 101 at \*30 (holding workers who have rehabilitative relationship with employers are not statutory employees); *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537 (1977) (explaining Board declined jurisdiction because of unique nature of relationship between employers and their disabled workers), *overruled by Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 765 (1991); *Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961, 964 (1960) (finding disabled workers in environment with primary purpose of rehabilitation does not establish employee status).

<sup>168</sup> See *Brevard*, 342 N.L.R.B. No. 101 at \*30–31 (detailing positive benefits received by disabled workers in preparation for employment in statutorily recognized environment); *Denver*, 304 N.L.R.B. at 765 (explaining how clients train for six weeks and can then seek outside employment); *Tidewater*, 304 N.L.R.B. at 768 (clarifying primary purpose of organization was to assist clients in finding normal jobs).

<sup>169</sup> See *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. No. 101, 2004-2005 NLRB Dec. (CCH) ¶ 16,762, at \*32 (2004) (concluding lack of congressional activity in this area indicates satisfaction with Board's approach); *Am. Totalisator Co.*, 243 N.L.R.B. 314, 314 (1979) (implying since Congress has not changed Board policies on this matter in the past, it sees no reason to disagree with Board's reasoning), *vacated by 1982 U.S. Dist. LEXIS 13726 (E.D.N.Y. 1982), rev'd*, 708 F.2d 46 (2d Cir. 1983). See generally *Sheltered Workshops*, 126 N.L.R.B. at 964 (finding working in environment with primary purpose of rehabilitation does not establish employee status).

<sup>170</sup> See *Brevard*, 342 N.L.R.B. No. 101 at \*31–32 (noting collective bargaining could harm rehabilitative programs); *Denver*, 304 N.L.R.B. 765–66 (identifying potentially harmful effects on rehabilitative process from collective bargaining); *Goodwill Indus. of S. California*, 231 N.L.R.B. 536, 538 (1977) (declining to authorize jurisdiction because collective bargaining would hinder special relationship between employer and client).

As seen with graduate student assistants under Title VII, the case of disabled individuals within rehabilitative programs under the NLRA has also been reviewed by federal courts on review of NLRB decisions.<sup>171</sup> However, in contrast to court's use of the compensated services analysis for determining graduate student assistant employee status, courts have consistently endorsed the use of the primary purpose test to determine disabled employee status in a rehabilitative program.<sup>172</sup>

Based on review of both Board and court decisions in this arena, the use of the compensated services approach for graduate students at a private university in today's academic environment and the primary purpose approach for disabled individuals in a rehabilitative program is proper. Although inconsistent with the Board's method of focusing on the primary purpose in *both* situations, the following analysis suggests that graduate students are substantially distinguishable from disabled individuals in a rehabilitative program.

In contrast to graduate student assistants engaged in a primarily educational relationship with a private university, disabled individuals engaged in a primarily rehabilitative relationship with a nonprofit program do not possess the same indicators of mutual economic interdependence that would suggest use of the compensated services approach.<sup>173</sup> Even

<sup>171</sup> See *Baltimore Goodwill Indus. v. NLRB*, 134 F.3d 227 (4th Cir. 1998) (holding severely disabled workers were not employees); *Ark. Lighthouse for the Blind v. NLRB*, 851 F.2d 180, 182 (8th Cir. 1988) (finding good faith efforts to employ handicapped people did not rise to level of normal employment relationship). *But cf.* *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 405 (5th Cir. 1983) (concluding \ Board did not err in determining situation to be non-rehabilitative); *Cincinnati*, 672 F.2d at 573 (affirming Board delegation of employee status in situation deemed not to be primarily rehabilitative).

<sup>172</sup> See *Baltimore*, 134 F.3d at 229 (explaining "case by case analysis" that Board usually does in rehabilitative workplace issues); *Ark. Lighthouse*, 851 F.2d at 182 (noting Board has divided term "employee" into two groups); *Cincinnati*, 672 F.2d at 571 (examining Board's policy of looking to see whether driving principle of employment is either rehabilitative or industrial).

<sup>173</sup> See *New York Univ.*, 332 N.L.R.B. 1205, 1207 (2000) (rejecting university's attempts to analogize graduate students with disabled individuals by noting that working conditions were not typical for private sector because counseling was emphasized for disabled workers), *overruled by* *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694 (2004); *Sheltered Workshops of San Diego, Inc.*, 126 N.L.R.B. 961, 961 (1960) (discussing nonprofit corporation that provided work experience under controlled conditions to disabled individuals who were unemployable elsewhere thus demonstrating purpose of work is to prepare for future employment where such economic interdependence would be expected); see also *Briskin*, *supra* note 12 (stating prior decisions examined economic purpose of work settings).

though these nonprofit programs qualify for certain government projects via federal statute when a certain percentage of man-hours of direct labor are performed by those with "severe disabilities," there is little indication that disabled individuals are admitted into a program solely for this purpose.<sup>174</sup> The projects are merely one part of a program's broader rehabilitation initiative, which focuses on helping the worker rather than using them as a cost savings tactic.<sup>175</sup>

From a wage standpoint, disabled individuals and non-disabled individuals earn equal hourly wages, with the exception of the non-disabled project leaders.<sup>176</sup> Although this fact suggests that equal pay should entitle disabled workers to equal treatment with non-disabled workers,<sup>177</sup> it also indicates that, in contrast to a private university's use of students, nonprofit corporations are not saving money by putting disabled individuals to work.<sup>178</sup> It also raises the possibility that these programs may even be expending additional funds to provide training, psychological

<sup>174</sup> Brevard Achievement Ctr., Inc., 342 N.L.R.B. No. 101, 2004-2005 NLRB Dec. (CCH) ¶ 16,762, at \*7 (2004) (referring to testimony of Brevard CEO who explained that, under federal Javits Wagner O'Day Act, 41 U.S.C. § 46 (2004), clients routinely move beyond "severely disabled" status and no longer can qualify as workers that allow Brevard to qualify for certain projects designated under the statute); see also *Tidewater*, 304 N.L.R.B. at 768 (explaining differences exist from employer/employee relationships when they are primarily rehabilitative); *Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 765 (1991) (illustrating fact that existence of nonprofit employer does not preclude Board from exercising its jurisdiction).

<sup>175</sup> *Brevard*, 342 N.L.R.B. at \*4-17 (noting Brevard's nonprofit status contains components such as community living program, adult day training, job placement in private sector jobs, and work/rehab opportunities at jobsites obtained by contract based on terms of federal statute); *Tidewater*, 304 N.L.R.B. at 768 (discussing differences that exist in supervision, discipline, production expectations, and support between employers who have primarily rehabilitative relationship with their clients); *Sheltered Workshop*, 126 N.L.R.B. at 965 (stating in dissenting opinion that payment rehabilitative clients receive is earned by work performed).

<sup>176</sup> *Goodwill Indus. of S. Cal.*, 231 N.L.R.B. 536, 537 (1977) (stating clients with disabilities work at their own pace and receive same wages as those not disabled), *overruled by* 304 N.L.R.B. 764, 765 (1991). See *Brevard*, 342 N.L.R.B. at \*5 (illustrating specific tasks of trainer); see also *Goodwill Indus. of Tidewater*, 304 N.L.R.B. 767, 767 (1991) (noting wages were paid to both disabled and non-disabled individuals).

<sup>177</sup> See *Brevard*, 342 N.L.R.B. at \*45 (Liebman, M. and Walsh, M., dissenting) (supporting argument that Act mandates finding of employee status for disabled janitors at issue); see also *S. Cal.*, 231 N.L.R.B. at 537 (asserting if union demanded higher wages, purpose of rehabilitative program may not be met). But see *Sheltered Workers*, 126 N.L.R.B. at 964 (stating disabled workers are paid in accordance with their proficiency).

<sup>178</sup> *Tidewater*, 304 N.L.R.B. at 767 (citing that employer claims to have lost money through program). See *Brown Univ.*, 342 N.L.R.B. No. 42, at \*58, n. 7 (Liebman, M., dissenting) (stating "[i]t stands to reason that graduate student wages are low because, to quote Sec. 1 of the Act, the 'inequality of bargaining power' between schools and graduate employees has the effect of 'depressing wage rates'"); see also *Denver*, 304 N.L.R.B. at 764 (explaining employer paid over \$1 million to disabled workers, and lost about \$100,000).

care, and counseling necessary to achieve a program's specified mission.<sup>179</sup>

While it is conceded that some disabled individuals may rely on wages to maintain a standard of living, the broader picture demonstrates that these individuals are rehabbing clients whose work is only one part of their goal to lead independent, self-sufficient lives.<sup>180</sup> In contrast, graduate students perform work that might provide them with teaching or researching skills, but the true benefit seemingly flows to the university as cost savings.<sup>181</sup> The fact that the *NYU* students were not required to work indicates that the work was *not* essential to post-graduate success. By comparison, the disabled individuals in *Brevard* were learning how to both perform certain fundamental skills and handle matters of everyday life.<sup>182</sup>

The fact that training and counseling are provided to the disabled individuals in a progress-oriented atmosphere, where workers are gradually prepared for outside employment, suggests that these programs have little interest in utilizing disabled workers once their skills are at their most efficient and effective

<sup>179</sup> See *Goodwill Indus. of Denver*, 304 N.L.R.B. 764, 764 (1991) (stating primary purpose of nonprofit corporation as providing employment, training and job placement to disabled individuals); see also *Tidewater*, 304 N.L.R.B. at 767 (explaining intention of charitable corporation to provide rehabilitation training and work experience to handicapped). See generally *Baltimore Goodwill Industries, Inc.*, 134 F.3d 227, 230 (1998) (discussing training and procedure of entrant handicapped individuals).

<sup>180</sup> *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. No. 101, 2004-2005 NLRB Dec. (CCH) ¶ 16,762, at \*7 (2004) (illustrating goal of program as bringing these disabled individuals to point of ability to work in competitive work environment). See *Tidewater*, 304 N.L.R.B. at 767 (asserting purpose of program as eventually placing handicapped individuals in more independent jobs); see also *Baltimore*, 134 F.3d at 230 (finding both disabled and non-disabled employees received long-term employment).

<sup>181</sup> See *Brown Univ.*, 342 N.L.R.B. No. 42, 2004-2005 NLRB Dec. (CCH) ¶ 16,694, at \*72-73 (2002) (dissent) (quoting Committee on Professional Employment, Modern Language Association, Final Report 3, "[a]s financial support for colleges and universities lag behind escalating costs, campus administrators increasingly turn to ill-paid, overworked part- or full-time adjunct lecturers and graduate students to meet instructional needs"); see also Ana Marie Cox, *Study Shows Colleges' Dependence on Their Part-Time Instructors*, CHRON. OF HIGHER EDUC., Dec. 1, 2000, at A12 (detailing graduate assistants, as of 2000, taught between seven to thirty-four percent of all undergraduate courses and nearly forty-three percent of all introductory courses). But see Joshua Rowland, *supra* note 19, at 960 (arguing graduate student teaching assistants receive true benefits in education they receive from teaching).

<sup>182</sup> See *New York Univ.*, 332 N.L.R.B. 1205, 1207 (2000) (analyzing university's program, which does not provide academic credit for basically all graduate assistant work and that it is not "solely the pursuit of education" that is at issue). But see *Brown Univ.*, 342 N.L.R.B. No. 42 at \*10-11 (noting that Brown places heavy emphasis on its education of graduate students through use of teaching and researching experience); Hutchens, *supra* note 1, at 127 (recognizing that universities strongly rely on graduate students to teach).



level.<sup>183</sup> By contrast, the use of untrained students to teach large classes for predetermined periods of time shows little regard for students' ability level and performance growth.<sup>184</sup>

In discussing how wages, hours, and conditions were the same between disabled and non-disabled individuals, the Board in *Brevard* determined that such similar treatment is outweighed by the substantial differences between the two types of workers.<sup>185</sup> These differences take the working relationship beyond the scope of the NLRA because both special accommodations and treatment are not characteristic of a typical economic relationship.<sup>186</sup> In contrast, graduate students receive no such special treatment or accommodations in performing many of the same tasks as full-time and part-time faculty members.<sup>187</sup> The students' work is under the strict control and direction of faculty professors and university administrators, signifying the existence of an employee/employer relationship.<sup>188</sup>

<sup>183</sup> See *Brevard*, 342 N.L.R.B. No. 101 at \*5-6 (describing difference between program for disabled and non-disabled persons); *Baltimore*, 134 F.3d at 227 (concluding program for disabled persons was rehabilitative); *Ark. Lighthouse for Blind v. NLRB*, 851 F.2d 180, 185 (8th Cir. 1988) (stating program was rehabilitative in purpose).

<sup>184</sup> See *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. No. 101, 2004-2005 NLRB Dec. (CCH) ¶ 16,762, at 18-19 (2004) (indicating primary purpose analysis has been affirmed by federal courts, falling in line with notion that such programs fulfill their mission of rehabilitating clients); see also *Baltimore*, 134 F.3d at 227 (affirming primarily rehabilitative standard at federal level in proper deference to Board policy); *Ark. Lighthouse*, 851 F.2d at 185 (stating board erred in finding lighthouse employees were employees within meaning of NLRA).

<sup>185</sup> *Brevard*, 342 N.L.R.B. No. 101 at \*23-24 (stating disabled persons work at their own pace and performance problems are dealt with through additional training, rather than discipline); *New York Univ.*, 332 N.L.R.B. at 1207 (disagreeing with employer argument that disabled persons are comparable to graduate assistants); *Goodwill Indus. of Tidewater*, 304 N.L.R.B. 767, 769 (1991) (holding that handicapped persons were not employees while non-handicapped persons were considered employees).

<sup>186</sup> See Craig L. Briskin & Kimberly A. Thomas, Note, *The Waging of Welfare: All Work and No Pay?*, 33 HARV. C.R.-C.L. L. REV. 559, 583 (1998) (explaining four factor analysis employed by NLRB to determine if workers were considered employees); Rowland, *supra* note 19, at 961 (discussing *Goodwill of Tidewater* holding that disabled persons were not employees under NLRA); *Recent Case*, *supra* note 88, at 722 (analyzing Arkansas court's opinion which stated that encouraging productivity and creating working conditions similar to those in private businesses promoted rehabilitative purpose of employment of disabled persons by exposing them to conditions they would face outside lighthouse).

<sup>187</sup> See Miller, *supra* note 99, at 205 (discussing court case ruling that student status did not negate employee status); Panchyshyn, *supra* note 40, at 127-29 (reviewing factors analyzed in determining that medical residents are not employees for purposes of unionization); Rowland, *supra* note 19, at 944 (explaining, until recently, students who work at universities were not considered employees because their work was considered incidental to their academic objectives).

<sup>188</sup> See Hayden, *supra* note 7, at 1250 (stating how, because students work under control of department, their relationship is indistinguishable from master-servant

Although disabled individuals work under the control and direction of program leaders, the existence of looser productivity standards and disciplinary procedures demonstrate that the focus is on training and preparation to prepare the disabled workers for future employment elsewhere.<sup>189</sup>

### CONCLUSION

The changed nature of the academic working environment has upended the longstanding argument that graduate students cannot be classified as employees because they are primarily students. There is no doubt that a graduate student primarily attends a university to learn, but to end the argument there is to shut the blinds and live comfortably in the academic setting of 1970. As seen in the public sector, the degree of economic interdependence currently permeating the private university campus has created a situation falling within the purview of the NLRA.<sup>190</sup> To deny students a protected fundamental right to collectively bargain for fair wages, hours, and working conditions while allowing universities to feed off of them as a cost-cutting measure will potentially allow the unequal balance of power between parties to widen. As a result, students may be less willing to pursue a graduate degree out of fear they will neither be able to afford the tuition nor handle the significant workload imposed upon them.

As a result of the modern academic environment, bringing back the compensated services approach with a consideration of students' economic position is the best way to move forward.

relationship); Hutchens, *supra* note 1, 106 (discussing blurred lines existing between graduate students and faculty acting as students' employers, advisors, and teachers); *Recent Case*, *supra* note 88, at 2558 (explaining decision stating that graduate assistants perform services under control of employer).

<sup>189</sup> *Tidewater*, 304 N.L.R.B. at 768 (holding significant differences exist in supervision, discipline, production expectations, support, and other areas to extent that relationship between Employer and disabled persons is primarily rehabilitative and working conditions for disabled persons are not typical of private sector); *Ark. Lighthouse for Blind v. NLRB*, 851 F.2d 180, 183 (8th Cir. 1988) (finding no employer-employee relationship because purpose was rehabilitative); Rowland, *supra* note 20, at 960 (discussing holding in *Goodwater* that disabled persons' employment was rehabilitative).

<sup>190</sup> *Yale University v. NLRB*, 1997 N.L.R.B. Lexis 619, \*9 (1997) (stating "[i]t is abundantly clear that the teaching fellows are a major resource for the University in providing undergraduate education"); Rohrbacher, *supra* note 6, at 1849 (noting teaching assistants 'provide teaching services, which would otherwise have to be provided by professors, at considerably less than cost of professor).

Although students can attempt to collectively bargain without NLRA protection, a university can simply choose not to recognize them. Classifying students as employees will cause both sides to operate in a fair and effective manner. Consequently, refusing to classify graduate student assistants as employees is effectively a denial of their fundamental rights under the Act.